Ontario

THE ROYAL COMMISSION ON VIOLENCE IN THE COMMUNICATIONS INDUSTRY

RESEARCH REPORT

CONSTITUTIONAL JURISDICTION OVER VIOLENCE IN THE MASS MEDIA INDUSTRIES

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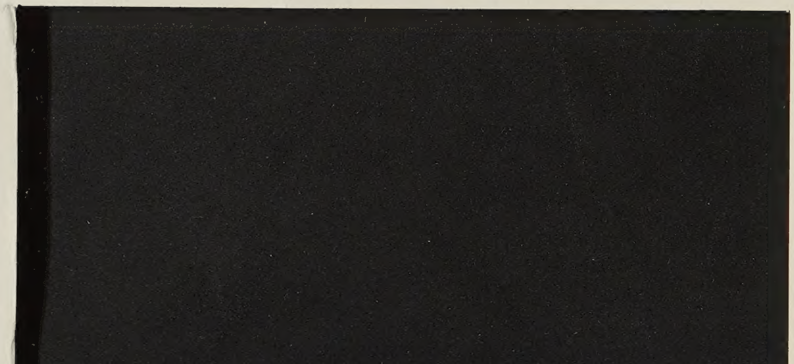
1976



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The views expressed in this report are those of the author(s) and do not necessarily reflect those of the Royal Commission on Violence in the Communications Industry, whose conclusions will be presented in its Final Report.

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THE ROYAL COMMISSION ON VIOLENCE
IN THE COMMUNICATIONS INDUSTRY

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CONSTITUTIONAL JURISDICTION OVER VIOLENCE
IN THE MASS MEDIA INDUSTRY

Terms of Reference

The Royal Commission on Violence in the Communications Industry was established by the Government of Ontario by Order in Council dated May 7, 1975. The task of the Commission is to study violence in the communications industry and, ultimately, "to make appropriate recommendations, if warranted, on any measures that should be taken by the Government of Ontario, by other levels of Government, by the general public and by the industry". It will be noticed that the Commission's recommendations are not to be confined to matters falling within the constitutional jurisdiction of the Province of Ontario, and I am instructed that the Governments of other Provinces, and of Canada, are interested in the work of the Commission and may well be receptive to recommendations designed to reduce the level of violence in those aspects of the communications industry which fall outside the jurisdiction of the Province of Ontario. Nevertheless, it is obviously essential to identify the parameters of constitutional jurisdiction in order to determine the scope for an effective legislative regime in Ontario, and which matters might be referred to authorities outside the Province for consideration.

This study was commissioned by the Royal Commission on Violence in the Communications Industry by letter dated May 21, 1976 from Mr. C.K. Marchant, the Commission's Director of Research, to me. The scope of the study is set out in that letter as follows:

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This study was commissioned by The Royal Commission on Violence in the Communications Industry by letter dated May 21, 1976 from Mr. K.C. Marchant, the Commission's Director of Research, to me. The scope of the study is set out in that letter as follows:

The purpose of this project is to analyze and report on the constitutional jurisdictions of the Canadian federal and provincial powers to regulate or control violent content in mass media, or to affect mass media content and behaviour with a view to altering the nature or amount of depictions of violence.

The mass media industries to be included are: films, radio and television broadcasting; cable television; pay television; videotapes and videodiscs; newspapers; magazines; books; records; and public performances involving the use of mass media materials, such as live theatre and rock concerts. Production, importation and distribution or other dissemination and audience consumption access or exposure are to be included.

The analysis should include those governmental policy possibilities identified on pages III-29 to III-34 inclusive of the Interim Report of the Royal Commission, a copy of which is attached. In addition, the following legislative approaches should be considered: statutory basis for industry self-regulation, perhaps analogous to that enjoyed by the legal profession; content classification systems; use of taxation approaches as a regulatory device; regulation of films shown on broadcast television; regulation of advertisements for films on broadcast media; any other policy approaches which you consider it appropriate to include.

I might add what is perhaps not explicit in the foregoing, but was emphasized orally to me by the Commission. My instructions are not to argue the case for extensive provincial jurisdiction over the mass media industries. On the contrary I am instructed to study the relevant constitutional law and give my unbiased opinion as to the correct boundaries of jurisdiction. As will emerge in the following text, there are many unsettled questions about constitutional jurisdiction over the media. On each of these questions arguments can be advanced for provincial jurisdiction and other arguments can be advanced for federal jurisdiction. On such questions I have indicated the arguments on both sides, but I have also indicated which view appears to me to be stronger. On some questions my own view favours provincial jurisdiction; on others federal jurisdiction. But on every question I have attempted to give a dispassionate opinion.

The British North America Act

Throughout this paper there will be constant reference to the provisions of the British North America Act, 1867, which is of course Canada's constitution. The important sections of the Act are ss. 91, 92 and 93. For future reference the salient parts of those sections are reproduced below.

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-
>
> ...
>
> 2. The Regulation of Trade and Commerce.
>
> ...
>
> 3. The raising of Money by any Mode or System of Taxation.
>
> ...
>
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
>
> ...
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated that is to say,-

...

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

...

10. Local Works and Undertakings other than such as are of the following Classes:-

    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

    (b) Lines of Steam Ships between the Province and any British or Foreign Country;

    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

...

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this section.

16. Generally all Matters of a merely local or private Nature in the Province.

92. In and for each Province the Legislature may exclusively make laws in relation to Education, ...

Distribution of Legislative Power

Legislative power in Canada is distributed between the federal Parliament and the provincial Legislatures by the British North America Act. The three principal sections of the B.N.A. Act are ss.91, 92 and 93 which have just been set out in part. Section 91 lists a number of classes of subjects which are within the exclusive legislative power of the federal Parliament; section 92 lists other classes of subjects which are within the exclusive legislative power of the provincial Legislatures. The possibility of a gap in legislative power is obviated by the opening words of s.91 which give to the federal Parliament the power "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces". This language makes clear that the residue of legislative power — over those matters not specifically listed — falls within the peace, order, and good government power of the federal Parliament.[1]

For the purpose of this paper the following powers should be especially noticed. On the federal side the peace, order and good government (hereinafter, "p.o.g.g.") power has been given as a justification for federal jurisdiction over radio and television, and, occasionally, over civil liberties generally. Still on the federal side, s.91(29)

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1. There has been lively debate among constitutional lawyers as to the precise nature of the relationship between the opening words of s.91 and the lists of subjects in ss.91 and 92. The statement in the text would not command universal agreement, but I believe it to be essentially accurate (and see W.R. Lederman, "Unity and Diversity in Canadian Federalism" (1975) 53 Can. Bar Rev. 597, 602-603) and it will certainly serve for the purpose of this paper.

confers on the federal Parliament the power to make laws in relation to matters "expressly excepted" from the provincial list. This is a reference to s.92(10) which, by paragraph (a), excepts from provincial power "works and undertakings connecting the province with other or others of the provinces, or extending beyond the limits of the province". This power over interprovincial works and undertakings gives to the federal Parliament its authority over much interprovincial transportation and communication (railway, bus, truck, telephone, for example), and it has been given as a further justification for federal jurisdiction over radio and television. Finally on the federal side, is the power to enact criminal law under s.91(27). This power has been suggested (as well as the p.o.g.g. power) as giving jurisdiction to the federal Parliament over civil liberties in general, and censorship in particular.

Turning to the provincial list, the principal powers for our purposes are those over "local works and undertakings" in s.92(10), over "property and civil rights in the province" in s.92(13), and over "matters of a merely local or private nature in the province" in s.92(16). Generally speaking, the regulation of local transportation or communications systems are within provincial power under s.92(10), and the regulation of business, and of entertaining and cultural events is within provincial power under either or both of ss.92(13) and 92(16). In addition, the provincial Legislatures have the power over "education" under s.93.

Despite the fact that the B.N.A. Act describes each list of powers as exclusive to the legislative body to which it is assigned, there is considerable scope for overlapping of power. A particular event or organization will usually be subject to both federal and provincial laws, for example, a hockey game will in most respects be governed by

provincial laws, because it is a local event; but all participants will be covered by the federal Criminal Code; and if the game is broadcast on radio or television the broadcast will come within federal regulation. This is an example of what constitutional lawyers call the "double-aspect doctrine". A particular set of facts will normally present two or more "aspects" which are relevant for constitutional purposes. The hockey game, from one aspect, is a local entertainment within s.92(16) of the B.N.A. Act; from another aspect it involves bodily contact which could in certain circumstances be a criminal act within s.91(27) of the B.N.A. Act; and from yet another aspect it is the subject of an over-the-air broadcast which is within the peace, order, and good government language of s.91 of the B.N.A. Act. In other words the lines of constitutional jurisdiction which are drawn by ss.91, 92 and 93 of the B.N.A. Act rarely follow precisely the factual boundaries of a particular event or industry.

The scheme of this paper will be to examine each of the media industries and to determine where "primary" legislative jurisdiction over that industry lies. Thus, sections follow on films, live theatre, literature, records, radio and television. Then sections of the paper will deal with constitutional doctrines which cut across the boundaries of particular industries. Finally, the paper will examine the constitutional jurisdiction over each of the policy options which is suggested in the Interim Report of the Royal Commission.

Films

Movie theatres, like most other businesses, come within the legislative competence of the provinces. Their locations, their design and construction, safety and health requirements, the qualifications of projectionists and other personnel, the storage and rental of films, advertisements for film showings, times of showings, and ticket prices would all be matters within "property and civil rights in the province" (B.N.A. Act, s.92(13)), or "matters of a merely local or private nature in the province" (B.N.A. Act, s.92(16)), and could be regulated by the Province if it chose to do so. This conclusion is not affected by the international or interprovincial elements of the film industry, such as the fact that the films shown may be imported from other countries, or that an individual theatre may be part of a chain of theatres stretching across the country. Each province is free to impose its own regime of regulation upon the movie theatres within its borders.

While most businesses in a province are chiefly regulated by the province, they are of course also bound by valid federal laws, of which the most pervasive is the criminal law. The manager of a movie theatre will, for example, be guilty of an offence under s.163 of the federal Criminal Code if he permits the showing of a film which is "an immoral, indecent or obscene performance, entertainment or representation". By the same token, a provincial law purporting to apply to a movie theatre which is "in pith and substance" a criminal law (or other law competent only to the federal Parliament) will be invalid. In other words the distribution of legislative jurisdiction does not exactly follow the boundaries of a particular industry. Legislative jurisdiction

over movie theatres, while it is predominantly provincial, is also partly federal.

The regulation of the content of movies (whether by censorship, classification coupled with compulsory age admission restrictions, Canadian content quotas, or by other means) is a topic which sits close to the borderline between federal and provincial jurisdiction. This is true not only of movies, but also of books, magazines, comics, newspapers, records, and, of course, live theatre and concerts. Accordingly, I deal with the general topic of content regulation in one section later in this paper.[2a] In the case of radio and television, it appears that the boundaries of federal legislative authority do approximate closely to the boundaries of the industry, and that virtually all aspects of the industry, including content, may be federally regulated.[2b]

2a. Pages 44, 82, below.

2b. Page 21, below.

Live Theatre

By live theatre I include all forms of stage production, including plays, vaudeville, concerts. As in the case of movies, most aspects of live theatre are matters of property and civil rights in the province, or local matters, and are accordingly under provincial legislative authority under ss.92(13) and 92(16) of the B.N.A. Act. But the question whether the province can regulate the content of a live production is a matter of controversy, depending upon the same issues as apply to films and to literature. The question is accordingly dealt with separately, later.[2c]

2c. Pages 44, 82, below.

Literature

By literature I mean all forms of written communication, including books, magazines, comics and newspapers. The publication, distribution and sale of all of these kinds of literature may be regulated by the province within which the publication, distribution or sale occurs. These are clearly matters within property and civil rights in the province. This conclusion is not affected by the fact that the publisher or distributor may be a nation-wide organization, or that the literature is destined for export to other provinces or countries, or that the literature was imported from other provinces or countries. On the other hand, assuming that content regulation is competent to the province, it could not be applied to literature mainly destined for readers out of the province: content regulation could be applied at the stage of publication only in the case of predominantly local literature such as local newspapers or magazines, and would have to be applied at the stage of distribution in the case of books, national or foreign magazines, comics and other material. But, as in the case of movies and live theatre and concerts, the question of legislative jurisdiction to regulate the content of literature is a vexed question which receives separate general treatment, later.[2d]

2d. Pages 44, 82, below.

Records

Under this heading I include records, tapes, videodiscs and videotapes. These are all in the same constitutional situation as literature.

Radio

National Dimensions of Radio Broadcasting

In the Radio Reference (1932)[2] the Privy Council decided that the federal Parliament had (in the language of the order of reference) "jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of hertzian waves, and including the right to determine the character, use and location of apparatus employed". This case probably settles the question of legislative jurisdiction over radio broadcasting in favour of the federal Parliament.[3]

In strictness it must be pointed out that the legal basis for the Radio Reference decision admits of some doubt. The Privy Council gave two reasons. The first reason was the existence of a multilateral treaty which assigned radio frequencies among the various signatory states, one of which was Canada. In order to comply with this treaty it was necessary for the assignment of radio frequencies in Canada to be regulated by legislation. The Privy Council held that the power to enact this implementing legislation rested with the federal Parliament under the peace, order and good government power in the opening words of s.91

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2. Re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304.

3. See C.H. McNairn, "Transportation, Communication and the Constitution" (1969) 47 Can. Bar Rev. 355, 360; D. Mullan and R. Beaman, "The Constitutional Implications of the Regulation of Telecommunications" (1973) 4 Queen's L.J. 67, 74; Laskin, Canadian Constitutional Law (4th ed. rev., 1975), 497.

of the B.N.A. Act.[4] The second reason which the Privy Council gave for its decision was that radio broadcasting was an undertaking extending beyond the limits of any one province, and was therefore within federal legislative competence under s.92(10)(a) of the B.N.A. Act.

The Privy Council's first reason — that the federal Parliament has the power to implement treaties as part of its p.o.g.g. power — was repudiated by a differently constituted Privy Council only five years later in the Labour Conventions case (1937).[5] In this case the Privy Council rejected the concept of a treaty-implementing power, and insisted that the power to enact legislation implementing a treaty could be either federal or provincial, depending upon whether the subject-matter of the treaty fell within federal or provincial power.[6] The Labour Conventions case has been sharply criticized, and it is possible that the Supreme Court of Canada may revert to the reasoning in the Radio Reference.[7] But

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4. The power to implement treaties which is given to the federal Parliament by s.132 of the B.N.A. Act could not be relied upon, because the treaty had been entered into by Canada in its own right, and s.132 was applicable only to treaties entered into by the British Empire. However, by locating the power to implement the treaty in the peace, order and good government power, their lordships reached the same result. But, as noted in the text, below, this mode of reasoning was subsequently disapproved by the Privy Council in the Labour Conventions case, A.-G. Can. v. A.-G. Ont., [1937] A.C. 326.

5. A.-G. Can. v. A.-G. Ont., [1937] A.C. 326, and see previous note.

6. In the Labour Conventions case [1937] A.C. 326, 351 Lord Atkin criticized the Radio Reference as presenting "difficulty", but he suggested that it could be supported on other grounds.

7. For indications of this possibility, and a recital of some of the criticism, see MacDonald v. Vapor Canada Ltd. (1976), 66 D.L.R.(3d) 1, 27-31 per Laskin C.J.

unless and until that occurs the Labour Conventions case must be treated as casting doubt upon the validity of the first branch of the reasoning in the Radio Reference.

Even if we disregard the existence of the treaty (as dictated by Labour Conventions), it is likely that the p.o.g.g. power still gives to the federal Parliament the jurisdiction over radio broadcasting. The currently accepted definition of p.o.g.g.[7a] was laid down by the Privy Council in the Canada Temperance case:[8] p.o.g.g. will include any subject-matter which "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole." When this test was first articulated, their lordships cited the Radio Reference as a case which satisfied the test.[9]

Aeronautics is an interesting analogy. In the Aeronautics Reference (1932)[10] the Privy Council held that the federal Parliament had jurisdiction over aeronautics. This decision was based primarily on the existence of a "British Empire treaty" governing aeronautics. In 1947 Canada denounced this treaty, and, accordingly, thereafter could no longer rely upon it as a basis of legislative competence.[11] Nevertheless in Johannesson v. West St. Paul (1951),[12] the Supreme Court of Canada held

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7a. The "emergency" definition of p.o.g.g. is not appropriate for a matter such as radio: Anti-Inflation Reference (1976) 68 D.L.R. (3d) 452, 524 per Beetz J.

8. A.-G. Ont. v. Canada Temperance Federation, [1946] A.C. 193, 205.

9. Ibid. Their lordships also cited the Aeronautics Reference, [1932] A.C. 54 as another example. For discussion, see text following.

10. Re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54.

11. The old treaty was denounced in 1947 because Canada had become a party to a new treaty. But the new treaty could not provide the basis of federal legislative power under s. 132 of the B.N.A. Act because it was not a "British Empire" treaty, and the Labour Conventions case [1937] A.C. 326 would not permit a "Canada" treaty to be treated as equivalent to a British Empire treaty: see notes 4-7, and accompanying text, above

12. [1952] 1 S.C.R. 292.

that the federal Parliament still had the legislative competence under the Canada Temperance definition of p.o.g.g. Aeronautics, the court held, was an activity "which goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole". Most of the judges regarded this proposition as self-evident, but Locke J. referred to the volume of interprovincial and international traffic, to the use of aircraft as carriers of mail, and to the role of aviation in opening up and developing the nation.

Accepting, as we must, that aeronautics is within the p.o.g.g. power of the federal Parliament, it is clear that very similar, and perhaps even stronger, reasons can be advanced for allocating radio to the same head of power. The fact that radio signals do not respect provincial boundaries means that the limited range of frequencies cannot be assigned on a provincial basis, and the role of radio both as an interprovincial and international communications link and as a force for national identity and unity also gives it an important national dimension. In Re C.F.R.B. (1973),[13] the Ontario Court of Appeal decided that radio broadcasting was a matter within federal jurisdiction under the Canada Temperance definition of p.o.g.g., and they relied upon the analogy of aeronautics.[13a] The Supreme Court of Canada refused leave to appeal.[14]

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13. [1973] 3 O.R. 819.

13a. Accord, Anti-Inflation Reference (1976) 68 D.L.R. (3d) 452, 524 per Beetz J.

14. November 13, 1973. However, another decision raising some similar issues is currently under appeal to the Supreme Court of Canada. In Kellogg's Co. of Canada v. A.-G. Que., Que. C.A., June 20, 1975, unreported, the Quebec Court of Appeal followed Re C.F.R.B. and held that a provincial law purporting to regulate television advertising directed at children was unconstitutional. The Supreme Court of Canada on November 3, 1975, granted leave to appeal from the Kellogg decision.

Intraprovincial Broadcasting

The question whether radio communication falls within p.o.g.g. or not is important in considering whether federal jurisdiction extends to purely intraprovincial radio broadcasting. Does the federal Parliament have authority over a radio station whose signals cannot be received outside the province? In the Radio Reference the Privy Council considered this question and answered it yes.[15] But they did so as part of their discussion of the p.o.g.g. power. If the only reason for federal jurisdiction over radio broadcasting was its character as an interprovincial undertaking — the Privy Council's second reason for federal jurisdiction — then it might be thought that a radio station whose operations were genuinely intraprovincial would fall within provincial jurisdiction. Authority over most modes of transportation and communication, for example, telephone systems, pipelines, railways and road transportation, is divided on this territorial basis: intraprovincial systems are within provincial jurisdiction as "local works and undertakings", while interprovincial or international systems are within federal jurisdiction as "works and undertakings connecting the province with any other or others of the provinces or extending beyond the provinces".[16]

However, even if radio broadcasting were within federal jurisdiction only by virtue of the interprovincial undertaking power of

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15. [1932] A.C. 304, 313. In one of those distressing lapses for which the Privy Council became notorious in Canada, their lordships referred consistently to "inter-provincial" broadcasting, although in the context it is clear that they meant intra-provincial broadcasting. Yes, your lordships, there is a difference!

16. B.N.A. Act, s.92(10); under paragraph (c) a local work may be declared by the Parliament of Canada to be for the general advantage of Canada and it will thereby be brought within federal jurisdiction.

s.92(10)(a), there are some distinctive features of radio (and television) broadcasting which would tend to exclude provincial jurisdiction over even intraprovincial undertakings. An intraprovincial broadcaster must use the same kind of radio waves in the same frequency spectrum as an interprovincial broadcaster. The need to allocate space in the frequency spectrum, and to avoid interference, suggests that the power to regulate the interprovincial broadcaster must carry with it the power to regulate the intraprovincial broadcaster as well. In Re Public Utilities Commission and Victoria Cablevision Ltd. (1965),[17] a case which is later considered in some detail in connection with cable television,[18] the British Columbia Court of Appeal appeared to regard the entire field of radio and television broadcasting as one huge interprovincial undertaking. In other contexts the term undertaking in s.92(10) has been interpreted as meaning a particular organization or enterprise.[19] In the context of radio and television broadcasting, the shared use of the frequency spectrum does give plausibility to the broader meaning attributed to the term undertaking by Victoria Cablevision.

If federal jurisdiction over radio (and television) broadcasting is grounded in p.o.g.g., as I have suggested above,[20] then the national dimension of radio broadcasting would probably sweep even purely local stations into the federal net. Once again aeronautics affords an analogy, because local airlines have to use the same ground facilities and the same airspace as interprovincial airlines; and it is well settled that a

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17. (1965) 51 D.L.R. (2d) 716.

18. Page 29 below.

19. McNairn, (1969) 47 Can. Bar Rev. 355, 358.

20. Pages 16-17, above.

purely intraprovincial airline is within federal jurisdiction.[21] Since the better view is that radio broadcasting does fall within p.o.g.g., it seems that the Radio Reference's assertion of federal jurisdiction over intraprovincial broadcasting is probably good law. Certainly, the federal Broadcasting[22] and Radio[23] Acts assert federal regulatory jurisdiction over intraprovincial as well as interprovincial broadcasters.

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21. This is implied by the Aeronautics Reference, [1932] A.C. 54, 77 although their lordships were not asked to decide the point. It is asserted, obiter, in the Radio Reference, [1932] A.C. 304, 313, although the case concerned jurisdiction over radio, not aeronautics, and in Johannesson v. West St. Paul, [1952] 1 S.C.R. 292, 314, although Johannesson's operations did extend to two provinces. However, the point is distinctly decided by the B.C.C.A. in Jorgenson v. Pool (1959), 28 W.W.R. 265, 266. See generally Colin H. McNairn, "Aeronautics and the Constitution" (1971) 49 Can. Bar Rev. 411.

22. R.S.C. 1970, c. B-11.

23. R.S.C. 1970, c. R-1.

Content Regulation

The Radio Reference was concerned with the technical aspects of transmitting and receiving radio signals: because radio broadcasting takes place by means of electromagnetic waves of various frequencies which are transmitted in space, and because only a limited number of frequencies are available, regulation is necessary to control the use of a scarce public resource, and it can be effective only at the national level. It follows that the federal Parliament can regulate the "hardware" or "carrier systems" of radio broadcasting. The Privy Council was not asked to consider, and did not consider, whether or not the federal Parliament can also regulate the content of radio broadcasting.

In Re C.F.R.B. (1973)[24] the Ontario Court of Appeal had to determine the validity of a provision in the federal Broadcasting Act which prohibited any radio station from broadcasting "a program, advertisment or announcement of a partisan character" in relation to a federal, provincial or municipal election on the day before the election. The Toronto radio station C.F.R.B. was prosecuted for a breach of this section, alleged to have occurred on the day before a provincial election. The station applied to prohibit the prosecution on the ground that the section was unconstitutional. The station argued that the federal Parliament's power over radio broadcasting did not extend to program content. The Ontario Court of Appeal rejected this argument. They held that "it would be flying in the face of all practical considerations and logic to charge Parliament with the responsibility for the regulation and control of the carrier system and to deny it the right to exercise legislative control

24. [1973] 3 O.R. 819.

over what is the only reason for the existence of the carrier system, i.e., the transmission and reception of intellectual material".[25] The court concluded that "the exclusive legislative authority of Parliament with respect to radio communication extends to the control and regulation of the intellectual content of radio communication".[26] It followed that the impugned section of the Broadcasting Act was valid. An application was made to the Supreme Court of Canada for leave to appeal this decision, and leave was refused.[27]

The authority to regulate program content is a sufficiently vexed and complex issue that Re C.F.R.B. will probably not be the last word. But the decision has attracted other judicial support,[28] and it appears to me to be good law. Once it is accepted that radio communication is a matter which, in the language of the Canada Temperance Federation

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25. Id., 824.

26. Ibid.

27. November 13, 1973.

28. In Kellogg's Co. of Canada v. A.-G. Que. Que. C.A., June 20, 1975, unreported, a majority of the Quebec Court of Appeal held that a provincial law purporting to regulate television advertising directed at children was unconstitutional; Re C.F.R.B. was followed. In Re Capital Cities Communications Inc., [1975] F.C. 18 the Federal Court of Appeal had to decide whether the Canadian Radio Television Commission had the authority to authorize a cable television company to delete commercials from programs received over the air from Buffalo, New York, and to substitute other commercials. In deciding that the C.R.T.C. did have the power the court held that the federal Parliament had constitutional authority "over the content of broadcasts as well as over the physical undertaking of the television reception unit" (per Ryan J. at p. 25). Re C.F.R.B. was cited in support. Both these decisions are currently under appeal to the Supreme Court of Canada.

case, goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole, then it becomes difficult to argue that program content should be provincial. The federal Broadcasting Act[29] asserts a number of national objectives which imply the necessity to regulate program content. Thus, the Act asserts that all broadcasting undertakings in Canada "constitute a single system"; that the system should be owned and controlled by Canadians "so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada"; that "the right to freedom of expression...is unquestioned"; that the programs provided by the system "should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programing provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources"; that programs should be available in both English and French; that a national broadcasting service should be provided "that is predominantly Canadian in content and character", that will actively contribute to the flow and exchange of cultural and regional information and entertainment" and to "national unity" and "Canadian identity". The Act goes on to assert that the objectives of federal policy "can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority". The authority referred to is the Canadian Radio-Television and Telecommunications Commission which is established by the Broadcasting Act, and which, while lacking the

29. R.S.C. 1970, c. B-11, s. 3.

power to censor particular programs, has extensive powers to make general regulations applicable to broadcasters respecting such matters as the allocation of broadcasting time to various points of view or kinds of programs, and to impose conditions upon the licences of particular broadcasters.

While the existing case-law does not justify complete confidence in the constitutional validity of the federal assertion of jurisdiction over content of radio programs, the probable conclusion is that the assertion is justified: it is the federal Parliament which possesses the legislative power to regulate the content of radio programs. For reasons which will be explained later this does not wholly ~~con~~exclude provincial legislative authority, but it probably excludes any unilateral provincial attempt to regulate violent content in radio programs, or to censor radio programs. The same conclusions probably follow in respect of television, which is discussed next.

Television

Broadcast Television

Television was almost unknown as a means of communication in 1932 when the Radio Reference[30] was decided. But it had been invented, and the reference to the court asked for its opinion as to the constitutional jurisdiction not only over sound radio, but also over the transmission and reception of "pictures" by means of hertzian waves. A report by the Minister of Justice which was placed before the court described television and included it in the term "radio".[31] Thus, although their lordships of the Privy Council made no specific reference to television in their opinion, their answer to the question referred did literally apply to television as well as radio.[32] And of course the reasoning in the case applies with the same force to television as to radio. Broadcast television also utilizes electromagnetic waves in space, and its hardware or carrier system requires national regulation just as much as radio and for the same reasons. Moreover, the argument for national regulation of program content also has exactly the same force in relation to television as it has in relation to radio. It seems plausible to conclude that as goes radio so goes television.[33] This is of course the policy of the federal government: the licensing and regulatory re-

30. [1932] A.C. 304; see text accompanying note 1, above.

31. [1931] S.C.R. 541, 542.

32. See R. v. Communicomp Data Ltd. (1974), 6 O.R. (2d) 680, 698.

33. Re Public Utilities Commn. and Victoria Cablevision Ltd. (1965) 51 D.L.R. (2d) 716; Kellogg's Co. of Canada v. A.-G. Que., Que. C.A., June 20, 1975, unreported, leave to appeal to S.C. Can. granted on November 3, 1975; Mullan and Beaman, (1973) 2 Queen's L.J. 67, 80; Laskin, Canadian Constitutional Law (4th ed. rev., 1975), 497.

quirements of the Broadcasting[34] and Radio[35] Acts apply to television as well as radio stations.

It is probable, once again, that the federal assertion of jurisdiction is justified, that is to say, it is the federal Parliament which has jurisdiction over broadcast television, including program content. The preceding discussion of radio is all relevant to broadcast television as well. Where television presents a new constitutional issue is in respect of cable television, and it is to that topic that we must now turn.

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34. R.S.C. 1970, c. B-11.

35. R.S.C. 1970, c. R-1.

Cable Television

Cable television, or Cablevision or CATV (Community Antenna Television), differs from broadcast television in that viewers receive their signals through a cable rather than through the air. A cable television system consists essentially of two parts. The first part is the "head end", which consists of an antenna placed to pick up the signals from the television-broadcasting stations in the area and which includes equipment designed to improve and strengthen the signal. The second part of the cable system is the "distribution system", which is the network of coaxial cable, which can be strung along utility poles or buried underground which carries the signal from the head end into the homes of subscribers who pay rent to the cable company for the service.[36] The notable feature of a cable television system is that it does not require radio frequency space, because it only uses a receiving antenna. The transmitting occurs on the cable which places a strict geographical limit on the range of the signals and which ensures that the cable system's signals cannot interfere with the signals of radio or television broadcasting stations or with the signals of other cable systems. It is also possible for programs to be locally produced and supplied on one or more "community channels" of the cable; such programs originate and terminate within the local confines of the cable system. Even with respect to programs initially received by air on the head end, there is an argument that the cable system is a self-contained undertaking which

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36. These definitions are essentially those of Richard A. Shaw in "The Cities, Cablevision and the Constitution" (1971) 29 U. of T. Fac. Law Rev. 28, an excellent article on municipal taxation and regulation of cable television.

is within provincial control as a local work or undertaking under s.92(10) of the B.N.A. Act.

In the Radio Reference[37] it was argued by the provinces that even if radio transmitters had to be regulated federally because of the limitations of the radio frequency spectrum, the receivers did not require regulation because they did not interfere with other users of the radio frequency spectrum. The Privy Council refused to draw a distinction between transmitters and receivers. Their lordships held that once it was determined that the transmitter came within federal control, the receiver "must share its fate".[38]

> "Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other".[39]

And their lordships added, finally, that "a divided control between transmitter and receiver could only lead to confusion and inefficiency".[40] This clear holding in the Radio Reference that transmitter and receiver must be treated as parts of one system for constitutional purposes appears to resolve any question about legislative jurisdiction over the head end or receiving apparatus of a cable television system: the juris-

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37. [1932] A.C. 304.

38. Id., 315.

39. Ibid.

40. Id., 317.

diction must be federal.[41]

If the cable system's head end must be within federal jurisdiction, what of the distribution system — the cable network which pipes the signals from the head end into the homes where the television sets are located? Is this a separate local undertaking within provincial jurisdiction? The Court of Appeal of British Columbia in Re Public Utilities Commission and Victoria Cablevision Ltd. (1965)[42] answered no. In that case the Public Utilities Commission of British Columbia, purporting to act under a provincial statute, had asserted regulatory authority over several cable television companies by demanding information from the companies regarding their subscribers, rates and years of operation. The companies had refused to comply on the ground that their operations were outside provincial legislative jurisdiction. The Public Utilities Commission had stated a case for the opinion of the British Columbia Court of Appeal. The Court of Appeal accepted that the Radio Reference had settled that "the receiving of the programs by air" was "beyond doubt" within federal legislative jurisdiction;[43] and the court held that the distribution of the programs by cable was not a separate

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41. This was distinctly decided in Re Public Utilities Commn. and Victoria Cablevision Ltd. (1965), 51 D.L.R. (2d) 716, a case which is discussed in the text which follows. It might be added too that, to the extent that legislative jurisdiction over radio and television is premised on broader considerations than the need to assign and regulate the use of broadcasting frequencies (see pp.21-24, above), the argument for unitary treatment of transmitter and receiver becomes even stronger.

42. (1965) 51 D.L.R. (2d) 516

43. Id., 718 per Sheppard J.A.; accord, 722 per Maclean J.A.

local business. Sheppard J.A. held that the purpose of the cable network was simply to extend the effective range of the programs received by air; the rentals paid by the customers were paid for the programs, that is, for their receipt by the antenna (or head end) and their transmission to the customer, and not merely for the transmission by cable. If the programs had been transmitted by air from the antenna to the customers it would undoubtedly have been one undertaking and one business; it was "equally one undertaking though transmitted from the antenna by cable".[44] Maclean J.A. said that the cable system was "nothing more or less than an integral part of the receiving facilities".[45] The other three judges all agreed with both Sheppard and Maclean JJ.A.[46] Thus the court was unanimous in its view that the cable companies' businesses were parts of an indivisible communications undertaking within the legislative competence of the federal Parliament.[47]

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44. Id., 719.

45. Id., 723.

46. The judgments appear to assume that s.92(10)(a) of the B.N.A. Act is the basis for federal jurisdiction, although Maclean J.A. (at p.722) does mention p.o.g.g.; and this assumption seems to depend upon giving a very broad meaning to the word "undertaking" in s.92(10)(a): see p.19, above. Contrast Re C.F.R.B., [1973] 3 O.R. 819 where the Ontario Court of Appeal decided that p.o.g.g. was the basis of federal jurisdiction: see p.17, above.

47. Accord, Re Oshawa Cable TV Ltd. and Town of Whitby (1969) 4 D.L.R. (3d) 224; Re Capital Cities Communications Inc., [1975] F.C. 18. R v. City of New Westminster; Ex parte Canadian Wirevision Ltd. (1965) 55 D.L.R. (2d) 613 does not cast doubt on this proposition (see the reference to Victoria Cablevision at p.618), although the decision that a municipality can deny entry to a company which is federally-licensed to supply cable television is probably wrong: page 41, below.

Where does the reach of Federal power end? The reasoning of Victoria Cablevision would appear to grant federal regulatory jurisdiction over a television antenna on an apartment building with lead-in connections to individual apartments.[48] Indeed, it would extend much further: to an antenna on the roof of a detached house; to the "rabbit's ears" on an individual set; and indeed to every individual television set which receives broadcast programs, whether by air or by cable. For example, the compulsory provision of pre-set locking devices on television sets (to enable parents to control in advance the hours of reception) would probably require federal legislation.

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48. Cf. R. v. Communicomp Data Ltd. (1974), 6 O.R. (2d) 680, 684, 702.

[There are no notes 49 and 50.]

Even if we grant the most expansive possible interpretation of Victoria Cablevision, namely, that it declares that federal power follows broadcast signals all the way to the viewer's set, even when part of the journey is travelled by cable, the case is entirely silent about jurisdiction over the programs which are locally produced (or purchased in tape form) and fed onto a channel of the cable system directly from the studio. These "local programs" have never been broadcast and have not been received by the head end. So far as these programs are concerned, the cable system cannot be described as "an integral part of the receiving facilities",[51] and the reasoning of Victoria Cablevision has no obvious application. If we postulate a cable television system which carried only local programs, the purely local origin of all programs suggests the analogy of a closed-circuit television system of the kind commonly organized in schools or universities, or even a concert hall, theatre or cinema which uses television to serve a spill-over audience in an adjoining hall. Here, there does not seem to be any plausible claim to federal jurisdiction.

What the cable companies actually supply, of course, is at most only a few "community channels" carrying local programs and a larger number of channels carrying programs received from broadcast television stations. On the face of it, there would appear to be a strong argument for provincial jurisdiction over the local programs. There is, however, also a strong argument on the federal side of the case. So long as the cable system also provides broadcast programs, which is the existing

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51. Note 45, above.

situation, then it is arguable that the studio programs are a part of one undertaking whose characteristics are predominantly interprovincial. The courts have not been willing for example to sever into two undertakings a telephone company or a busline or a trucking company which does both local and long-distance business.[52] In each case the courts have held that a significant amount of regular interprovincial business turns the entire enterprise into an interprovincial undertaking.[53] It is likely that the court would view a cable television undertaking in the same light.

Reinforcing the case-law is the practical difficulty of divided jurisdiction over a cable television undertaking which springs from the fact that a cable system can only deliver a limited number of channels.[54] The decision to establish and maintain a "community channel" could involve the giving up of a broadcast channel, and vice versa. Of course it could be argued that the allocation of channels should be determined federally, while the content of at least the community channels should be regulated

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52. Toronto v. Bell Telephone Co., [1905] A.C. 52 (telephone); A.-G. Ont. v. Winner, [1954] A.C. 541 (busline); Re Tank Truck Transport Ltd., [1960] O.R. 497 affd. [1963] 1 O.R. 272 (trucking); R. v. Cooksville Magistrate's Court: Ex parte Liquid Cargo Lines, [1965] 1 O.R. 84 (trucking); and cf. The Queen (Ont.) v. Board of Transport Commrs., [1968] S.C.R. 118.

53. The interprovincial business need not be quantitatively predominant. In Tank Truck (previous note) it constituted only six percent of the company's business and in Liquid Cargo (previous note) only 1.6 percent. Yet the undertaking as a whole was held to be interprovincial in each case.

54. At the time of writing some cable systems are providing as many as thirty channels, and an even greater number is presently possible. New technological developments could, and probably will, greatly increase the number of available channels, and if this occurs the argument for unitary regulation will be much weakened. However, by the time this development occurs unitary federal regulation may have become an accomplished fact, not easily reversible.

provincially. But this is not very plausible, since the allocation of channels will be based upon judgments about content: whether a particular channel should carry American or Canadian or local or educational programs and what mix of these programs should be provided by the system. The argument for treating content separately from the allocation of channels is like the argument for limiting the Radio Reference[55] to the assignment of frequencies and other technical aspects of radio. It will be recalled that in the C.F.R.B. case[56] the Ontario Court of Appeal rejected the idea of dividing jurisdiction over radio, and the Supreme Court of Canada refused leave to appeal. Naturally, the C.F.R.B. court did not address itself to the distinctive issues raised by cable television, but the tenor of the decision gives no ground for belief that the courts will draw distinctions for regulatory purposes between local and broadcast channels carried by a single cable system. It is much more likely that the courts will hold that the entire cable system is within federal jurisdiction, both in respect of technical matters and in respect of program content. This is of course the position of the federal government, because the Broadcasting and Radio Acts each regulates cable television companies, along with radio and broadcast television stations.[57]

The foregoing discussion is related to a cable television system which delivers to its subscribers a mix of local and broadcast programs. As explained earlier there does not appear to be a strong

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55. [1932] A.C. 304.

56. [1973] 3 O.R. 819, and on this point see text accompanying note 24, above.

57. See Shaw, (1971) 29 U. of T. Fac. Law Rev. 28, 32.

case for federal control of a cable television system which delivers exclusively local programs. At present I understand that there are no such systems in Canada, but they may well come into being, and new technology may produce systems which are exclusively local. It is true that intraprovincial broadcasting is probably within federal jurisdiction under the peace, order, and good government power. This was argued above in respect of radio, using the analogy of aeronautics,[58] and the same considerations apply to broadcast television.[59] A similar argument could be made with respect to cable television, but there are some significant differences. A cable television system which carries only local programs differs from a local airline or broadcasting station in that the cable system is self-contained. An intraprovincial airline must compete with interprovincial airlines for airport facilities and air routes. Similarly an intraprovincial radio or television broadcaster must compete with interprovincial broadcasters for frequency space. Clearly, in both cases the need to share facilities and the possibility of interference makes unified control highly desirable if not essential. But a cable television system carrying only local programs is entirely self-contained. Its signals originate within the cable system and are confined to the system by the cable. The system need not use any facilities in common with broadcasters or other cable systems, and its signals cannot interfere with any broadcast or cabled signals. There appears to be no basis for a federal assertion of jurisdiction, even if jurisdiction over radio and television generally is premised on the

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58. Page 18, above.

59. Page 25, above.

p.o.g.g. power as is probably the case.[60] As argued above, the analogy with the exclusively local cable system is a closed-circuit system in a school or university, or a sport or theatre performance providing closed-circuit television coverage to a local spillover audience. In my opinion, the purely local cable system, or any new development which approximates to a local cable system, is within provincial jurisdiction as a local work or undertaking under s.92(10) of the B.N.A. Act.

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60. Pages 16-17, above.

Pay Television

The term "pay television" encompasses a variety of different systems, although they all utilize a cable to bring their product to their customers. Constitutional jurisdiction over pay television depends upon the same considerations as apply to cable television generally.[61] In essence, this means that a self-contained, purely local, system will be within provincial jurisdiction, while a system which is added to the standard cable television mixed offering will be within federal jurisdiction.

At the time of writing, there appears to be only one pay television system in operation in Canada. This is a cable system in the Crescent Town condominium development in Metropolitan Toronto, which supplies recent feature films to subscribers. The subscriber calls for the desired movie by pressing a button: the system immediately sends the movie to his television set; and later on the subscriber is billed $3.50 for the movie.[62] This system is not operated by a cable television company, and does not utilize the cable network of any cable television company. It utilizes its own network of cable, and does so exclusively for the provision of the pay television programs. It supplies no broadcast programs whatever. It is truly a closed-circuit system. As such it appears to be a purely local undertaking, and therefore outside federal legislative authority.[63] The fact that many or most of the films shown are foreign is constitutionally irrelevant, and does not detract from the

61. Pages 27-36, above.

62. The Globe and Mail, April 4, 1976.

63. Pages 34-36 , above.

local character of their exhibition.[64]

The kind of pay television which seems likely to become prevalent in Canada will be supplied on one (or more) of the channels of a cable television system. The "pay" channel, which would carry recent feature films, sporting events and other programs, would be available to all those subscribers of the cable television service who paid an extra fee for the "pay" channel.[65] The pay channel would be simply an addition to the mix of programs which is already available on the cable system. As such it would probably not shift the constitutional jurisdiction away from the federal Parliament any more than the existence of a community channel shifts the jurisdiction. The probable attitude of the courts would be that the entire cable service, including broadcast, local and pay channels, is a single undertaking entirely within the jurisdiction of the federal Parliament both as to its technical aspects and its program content.[66]

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64. This point has already been made with respect to theatres: p. 9, above.

65. The Globe and Mail, April 26, 1976.

66. See pp. 32-34 , above.

Provincial Jurisdiction over Radio and Television

Although broadcast radio and television, and most cable television, are, for the reasons given, within federal legislative authority, this does not wholly exclude provincial authority. While the legislative powers of the federal Parliament are described in s.91 as "exclusive", and the provincial powers are similarly described in s.92, the courts have developed the "double aspect" doctrine which introduces a substantial amount of concurrency. For example, a radio or television station would have to comply with provincial or municipal standards for the construction of its receiving equipment and premises;[67] a cable television company would probably be subject to provincial or municipal regulation as to the laying of the cable especially where this involves the use of municipal highways, utility poles, and airspace;[68] and radio and television stations would undoubtedly have to pay provincial or municipal taxes.[69]

It is even possible that some provincial regulation of program content is possible. The C.F.R.B. case[70] suggests one possibility. The radio station in that case was objecting to a provision in the federal Broadcasting Act which prohibited partisan broadcasts one day before a federal or a provincial or municipal election. In fact the infraction alleged against C.F.R.B. had occurred on the day before a provincial election. The Ontario Court of Appeal upheld the law as one in relation to radio-

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67. More dubious is the question of the application of zoning laws to the crucial matter of the location of the head end: cf. Johannesson v. West St. Paul, [1952] 1 S.C.R. 292.

68. Cf. Toronto v. Bell Telephone Co., [1905] A.C. 52, 60-61.

69. Bank of Toronto v. Lambe (1887), 12 App. Cas. 575. See generally Shaw, (1971) 29 U. of T. Fac. Law Rev. 28, 43-51.

70. [1973] 3 O.R. (2d) 819, discussed pp. 21-22, above.

communication, despite the fact that it affected provincial elections.[71] Now, of course, the province has legislative authority over provincial elections and over municipal elections;[72] and it may be that a provincial law in relation to provincial or municipal elections could validly apply to regulate all news media, including radio and television, for the limited purpose of protecting the integrity of the electoral process.[73]

However, even laws of general application which are undoubtedly intra vires the province in most of their applications cannot be applied to a federally-regulated undertaking where their effect would be seriously to impair the federal undertaking. Thus, a province may impose upon an interprovincial busline speed limits and other rules of the road, but may not stipulate restrictions as to routes and places of picking up and putting down passengers; the latter power could sterilize the federal undertaking.[74] For the same reason a provincial law may not require an interprovincial telephone company to obtain the consent of a municipality as a condition precedent to the supply of service in that municipality.[75]

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71. Id., 825.

72. B.N.A. Act, s.92(1) and (8).

73. The courts are not entirely predictable in their application of the rule that a law which is "in relation to" a proper subject-matter may validly "affect" the subject-matter of the other level of government: contrast the C.F.R.B. case and Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd., [1963] S.C.R. 584 (provincial law could affect federal election) with McKay v. The Queen, [1965] S.C.R. 798 (municipal by-law should be "read down" so as not to affect federal elections).

74. A.-G. Ont. v. Winner, [1954] A.C. 541.

75. Toronto v. Bell Telephone Co., [1905] A.C. 52.

Provincial Mechanics' liens legislation cannot apply to an interprovincial pipeline because the legislation would authorize the break-up and sale of the pipeline.[76] And, in the most recent (and most extreme) application of this immunity, the Supreme Court of Canada has held that provincial minimum wage legislation cannot apply to the Bell Telephone Company, because labour relations is a "vital part" of the company's interprovincial undertaking.[77]

There is a case which holds that a provincial law may authorize a municipality to stop a cable television company from operating in the municipality. In R. v. New Westminster; Ex parte Canadian Wirevision Ltd. (1965)[78] the British Columbia Court of Appeal held that a municipal council, purporting to act under a power conferred by the province's Municipal Act, could deny a "trade licence" to a cable television company which had been federally licensed to supply the municipality. The effect of the denial of the municipal trade licence was to preclude the cable company from servicing the municipality. The court held that the fact that the cable company was federally incorporated (as it was) did not give it immunity from laws prohibiting it from carrying on a particular line of business. This is good law.[79] But what the court failed adequately to consider was the fact that the company was operating an undertaking within federal regulatory jurisdiction. As a federally-regulated undertaking, it is immune from provincial laws which could sterilize the

76. Campbell-Bennett Ltd. v. Comstock Midwestern Ltd., [1954] S.C.R. 207.

77. Commission du Salaire Minimum v. Bell Telephone Co., [1966] S.C.R. 767; see generally Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47 Can. Bar Rev. 40.

78. (1965) 55 D.L.R. (2d) 613.

79. J. Ziegel in Ziegel (ed.), Studies in Canadian Company Law (1967), 177.

undertaking, and even from provincial laws applying to a vital part of the undertaking. For this reason the case is generally agreed to be wrongly decided.[80]

The true position, having regard to the cases cited earlier,[81] is that a province may not prohibit or impose serious restrictions on the entry of a cable television company to the province or to any municipality in the province, for this would be a power to sterilize a federal undertaking, or at least to affect a vital part of a federal undertaking. For the same reason a province may not authorize municipal councils to "license" cable companies or impose any other requirements upon them if the failure to obtain a licence or to fulfil other requirements would result in the company not being permitted to operate in the municipality. It follows too, and indeed it has been decided, that any attempt to regulate subscriber rates or installation charges would be invalid as impairing a vital part of the undertaking.[82] Furthermore — and this is crucial to the paper — any regulation of program content which goes beyond very limited purposes would probably be invalid. There

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80. Shaw, (1971) 29 U. of T. Fac. Law Rev. 28, 40; Mullan and Beaman, (1970) 2 Queen's L.J. 67, 83; Laskin, Canadian Constitutional Law (4th ed. rev., 1975), 561. Contra, Ziegel in the previous note, but Ziegel only addresses himself to the federal incorporation point.

81. Notes 74-77, above.

82. Re Public Utilities Commn. and Victoria Cablevision Ltd. (1965), 51 D.L.R. (2d) 716, 719 per Sheppard J.A.; the other opinion, written by Maclean J.A., does not use this argument.

is no case-law in this specific area, but it seems plausible to suggest that a province could require a radio or television station to make certain public service announcements. Whether a province could use its authority over provincial and municipal elections to impose program requirements on a radio or television station immediately prior to an election is much more dubious. Probably a province could not use its authority over education to require a radio or television operator to set aside a channel for educational use or to require other programming commitments.[83] Any program content, even if solidly based on an undoubted provincial power, would probably be held invalid as affecting a vital part of a federally-regulated undertaking. A provincial attempt compulsorily to censor violence out of television or radio programs, or to remove violent programs from certain viewing hours, or to impose quotas, or otherwise to regulate program content to the end of reducing the depiction of violence,would almost certainly be invalid. Any such regulation would have to be federal.

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83. Accord, Shaw, (1971) 29 U. of T. Fac. Law Rev. 28, 48. The Broadcasting Act, R.S.C. 1970, c. B-11, s.3(i), asserts that "facilities should be provided within the Canadian broadcasting system for educational broadcasting". See generally Ronald G. Atkey, "The Provincial Interest in Broadcasting under the Canadian Constitution" in Ontario Advisory Commission on Confederation, The Confederation Challenge (Queen's Printer, Toronto, 1970), Vol. 2, p.189.

Content Regulation in General

Introduction

The paper to this point has allocated each of the media to one or the other level of government. Thus, films, live theatre, literature and records are all primarily within provincial jurisdiction. Radio and television, on the other hand, are primarily within federal jurisdiction. However, as has been emphasized throughout, these allocations are only a starting point in considering whether a particular legislative measure should be enacted by a provincial Legislature or the federal Parliament. Many legislative powers cut across the boundaries of the media. Some federal laws are applicable to films, live theatre, literature and records despite those media's primary provincial allocation; and some provincial laws are applicable to radio and television, despite those media's primary federal allocation.

Of special importance to this study is the theory that legislative jurisdiction over speech, the press, and religion — the expression of ideas — does not follow the boundaries of the media, but is always federal no matter how local is the vehicle of expression. This theory is to be found in a number of important constitutional cases. This paper will now briefly describe each of these cases, will attempt to analyze the theories which run through them, and will attempt to assess its implications for regulating the depiction of violence in the media.

The Alberta Press Case

The first important case to articulate the proposition that the expression of ideas could not be controlled by a province was the Alberta Press case (1938).[84] This case concerned the constitutional validity of three bills enacted by the Legislative Assembly of Alberta[85] which gave effect to some of the policies of the province's Social Credit government. The bill which is relevant for our purposes was entitled "An Act to Ensure the Publication of Accurate News and Information". This "Press Bill" would have compelled every newspaper published in the province to publish any statement furnished to it by "the Chairman of the Social Credit Board" which had for its object the correction or amplification of any statement relating to any policy or activity of the government of the province which had already been published by the newspaper. The bill would have required every newspaper, upon being required by the Chairman in writing, to disclose the sources of any information published. The Bill would have given to the Lieutenant Governor in Council the power

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84. Reference re Alberta Statutes, [1938] S.C.R. 100.

85. The bills had not been enacted into law, because the Lieutenant-Governor had "reserved" the bills under s.90 of the B.N.A. Act, thereby remitting them to the Governor General to determine whether the royal assent should be given. The Governor General had not given the royal assent, but had referred the bills to the Supreme Court of Canada for an opinion as to their validity. The Supreme Court of Canada held all three bills to be invalid, and the province appealed the decision to the Privy Council. However, the Privy Council took the view that two of the bills, the Press Bill and the Credit Regulation Bill, were inoperative because of Alberta's repeal of the principal Social Credit Act, and that their validity was an academic question which they did not have to decide. The appeal was therefore permitted to proceed only on the third bill, the Bank Taxation Bill; and on that bill the Privy Council affirmed the Supreme Court of Canada: A.-G. Alta. v. A.-G. Can., [1939] A.C. 117.

to stop publication of a newspaper which contravened the provisions of the statute.

The Supreme Court of Canada held that the Press Bill was invalid.[86] Five of the six judges gave as their primary reason that the Bill was ancillary to and dependent upon the Alberta Social Credit Act and other social credit legislation. The entire scheme of social credit legislation was incompetent to the province as legislation in relation to "currency", "banking" and "trade and commerce", all subject matters assigned to the federal Parliament. On this basis the Press Bill fell with the rest of the legislation, and its validity apart from its association with other social credit legislation did not have to be decided. For Kerwin, Crocket, and Hudson JJ. this was enough to dispose of the case. But Duff C.J., with whom Davis J. concurred, while making clear that his primary ground of decision was the ancillary point, went on to discuss the validity of the Press Bill as an independent enactment. Cannon J., the remaining member of the court, was the only judge who did not rely on the ancillary point: he found the Press Bill invalid solely on independent grounds. It is his opinion and the dicta of Duff C.J. (and Davis J.) which are important for the purpose of this paper.

Both Duff C.J. and Cannon J. emphasized the fundamental importance of freedom of political discussion. Duff C.J. said that "the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions".[87] Cannon J. said that "democracy cannot be main-

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86. The Privy Council did not hear an appeal from the decision of the Supreme Court of Canada: see note 85, above.

87. [1938] S.C.R. 100, 133.

tained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State...".[88] Both judges concluded that the importance to the nation as a whole of free public discussion was such that it should not be characterized as a local or private matter under s.92(16) of the B.N.A. Act, or as a civil right "in the province" under s.92(13) of the B.N.A. Act. It followed that it could not be substantially curtailed by a provincial law. In Cannon J.'s opinion "the federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs", and any such federal law would be valid as a "criminal law".[89] In Duff C.J.'s opinion only "the Parliament of Canada possesses authority to legislate for the protection of this right [of free public discussion of public affairs]."[90] Duff C.J. did not clearly commit himself as to which head of federal legislative power would be applicable, but he appeared to assume that it would be the p.o.g.g. power.[91]

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88. Id., 146.

89. Id., 146.

90. Id., 133.

91. Id., 133-134. Notice too that in the passage quoted in the text Duff C.J. spoke only of federal power to legislate for the "protection" of public discussion, thereby leaving open the possibility that even the federal Parliament could not curtail public discussion. This ambiguity, along with the general tenor of the opinion, became the seed of the "implied bill of rights" theory: see Laskin, Canadian Constitutional Law (4th ed. rev., 1975), 900.20-900.25, and notes 116, 140, below.

The Alberta Press case shows that there are limitations on the provincial power to regulate newspapers, despite the fact that newspapers are primarily within provincial jurisdiction.[92] Duff C.J.'s reasoning starts from the explicit premise that newspapers are primarily within provincial jurisdiction:

> Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada...[93].

For Duff C.J. the issue was one of degree: the province could regulate newspapers so long as its regulation fell short of a substantial interference with the working of parliamentary institutions.[94] To relate his view back to the topic of this study, there is nothing in Duff C.J.'s opinion in the Alberta Press case which would cast doubt on the power of the province to censor or regulate the violence content of newspapers (or other local media); such regulation would have no, or very little, effect on political discussion in the newspapers or other media.

Cannon J.'s opinion can also be read as confined to provincial regulation for political ends, and as not essentially different from Duff C.J.'s opinion in this respect. Indeed, most of the opinion is

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92. See p. 12, above.

93. [1938] S.C.R. 100, 134.

94. He effectively underlined the word substantial by saying at the end of his judgment that he did not "find it necessary to express an opinion upon the concrete question whether or not this particular measure is invalid as exceeding the limits indicated above:" [1938] S.C.R. 100,135. He did not need to reach a conclusion because of his view that the legislation was invalid as ancillary to the general scheme of social credit legislation.

expressly related to political discussion. However, there is one passage in the opinion which could be read as indicating that any regulation of newspaper content from the viewpoint of public policy (as opposed to private rights such as are protection by defamation laws) would be in pith and substance a criminal law, and therefore competent only to the federal Parliament.[95] On this broad basis, it would appear that the regulation of violence content in newspapers would be incompetent to the provincial Legislatures. I shall give my reasons later for believing that this reading of Cannon J's judgment is not good constitutional law,[96] but let us first look at the other leading cases.

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95. [1938] S.C.R. 100, 144.

96. Page 58-62, below.

The Saumur Case

The next important case on provincial authority over the expression of ideas is Saumur v. City of Quebec (1953),[97] which concerned the constitutionality of a by-law of the City of Quebec which forbade the distribution of tracts or other written material in the streets of Quebec without the permission of the Chief of Police. It was agreed that the by-law was authorized by the literal language of the Quebec City Charter. The question was whether the Quebec Legislature had the constitutional power to authorize the City of Quebec to make the by-law, and that is the same question as whether the Quebec Legislature had the constitutional power to enact such a law itself.

The Saumur case was one of a number of famous cases brought in the Quebec courts in the 1950s by Jehovah's Witnesses, alleging harassment of various kinds at various levels of government in the province. The Witnesses' grievance against this particular by-law was that it purported to prohibit their practice of distributing tracts in the streets of Quebec City. The Witnesses refused to seek the permission of the Chief of Police under the by-law, because they regarded the by-law as fundamentally opposed to their religious beliefs. However, if they had applied to the Chief of Police it is reasonably clear that permission would not have been granted. On an application for permission to distribute written material in the streets, the normal practice of the Chief of Police was to examine the contents of the material to be distributed and to grant permission only if he found the contents acceptable. The tracts

97. [1953] 2 S.C.R. 299; [1953] 4 D.L.R. 641. The D.L.R. report contains translations of those judgments which were delivered in French.

which the Jehovah's Witnesses had been distributing in defiance of the by-law would have been found unacceptable, because they included attacks on the Roman Catholic Church which were not always moderate in tone, and which had generated considerable excitement in the province.

Saumur was a Jehovah's Witness who brought an action in the Quebec courts against the City of Quebec, seeking a declaration that the by-law was invalid and an injunction restraining the City from interfering with the activities of the Witnesses. Saumur lost the case at trial and lost again on appeal to the Quebec appellate court. He then appealed to the Supreme Court of Canada, where his appeal was allowed by the narrow margin of five to four. Actually, only four judges, namely, Rand, Kellock, Locke and Estey JJ., held that the by-law was unconstitutional, and five judges, namely Rinfret C.J., Kerwin, Taschereau, Cartwright and Fauteux JJ., held that it was constitutional; but Kerwin J. cast his vote with Rand, Kellock, Locke and Estey JJ. because he decided that the by-law, although constitutional, was inoperative in its application to the Jehovah's Witnesses on the ground that their activities were protected by a pre-confederation statute, the Freedom of Worship Act, which was in force in Quebec. This unique line of reasoning, although rejected by the other eight judges, became the basis of the court's order, because the other judges were evenly divided on the question whether or not the by-law was constitutional.[98]

A preliminary issue in the case was the constitutional classification of the by-law. The four dissenting judges, namely, Rinfret C.J.

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98. The formal order of the court, which had to be carefully framed to give effect to Kerwin J's reasoning, is set out in the D.L.R. report of the case: [1953] 4 D.L.R. 641, 728.

Taschereau, Cartwright and Fauteux JJ., classified the by-law as a law in relation to the use of the streets, and on that basis had no difficulty in holding that it was within the power of the province to enact.[99] The five majority judges, namely, Kerwin, Rand, Kellock, Estey and Locke J., disagreed with the minority's classification. Rand J. pointed out that, although the by-law could have been used simply to prevent traffic interference, to suppress nuisances and to reduce litter, it was in fact used to censor material proposed to be distributed; it followed in his view that the pith and substance of the by-law was in relation to "religion and free speech".[100] The other majority judges spoke in similar vein. Thus Kellock J. said that the by-law was not enacted in relation to "streets" but in relation to "the minds of the users of the streets".[101] And each of the other majority judges made clear, either by express words or by the general tenor of their judgments, that they regarded the by-law as in relation to speech or religion.[102]

For the majority judges who classified the by-law as in relation to the contents of the material to be distributed, as opposed to the physical act of distribution, it was necessary to decide where the legislative jurisdiction over speech and religion lay. Rand, Kellock and Locke

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99. [1953] 2 S.C.R. 299, 309 per Rinfret C.J. with whom Taschereau J. concurred; 381 per Cartwright J. with whom Fauteux J. concurred; Cartwright J. also held (at 381) that the by-law was in relation to "police regulations and the suppression of conditions likely to cause disorder," and he cited authorities (at 383) in support of the position that this was a matter within provincial power.

100. [1953] 2 S.C.R. 299, 333 per Rand J.

101. Id., 338 per Kellock J.

102. Id. 323-324 per Kerwin J.; 361 per Estey J. who only discusses religion (not speech); 368-369 per Locke J.

JJ. each quoted with approval the dicta of Duff C.J. and Cannon J. in the Alberta Press case,[103] discussed earlier,[104] and used those dicta as the basis for deciding that the by-law was incompetent to the province. Estey J. did not refer to the Alberta Press dicta, and he did not discuss freedom of speech at all, but he did hold that the practice of religion was outside the competence of the province, and that the by-law was therefore invalid.[105] Only Kerwin J. of the majority judges held that laws in relation to speech and religion were within provincial competence. He held that these rights were civil rights in the province within s.92(13) of the B.N.A. Act, and he expressly repudiated the dicta in the Alberta Press case.[106] Kerwin J. therefore disagreed with the other majority judges and held that the by-law was valid. The reason why he still cast his fifth and crucial vote with the judges who held the by-law to be invalid was explained earlier.[107] The four dissenting judges did not need to discuss jurisdiction over speech or religion, because they had not classified the by-law as dealing with speech or religion.[108] However, Cartwright J., with whom Taschereau J. concurred, gave his view, obiter, that "freedom of the press is not a separate subject matter committed exclusively to either Parliament or the Legislatures. In some respects, Parliament, and in others, the Legislatures may validly deal with it."[109] In respect of religion, Cartwright J. gave his view, again

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103. Id., 331 per Rand J; 353-355 per Kellock J.; 373-375 per Locke J.

104. Page 46, above.

105. [1953] 2 S.C.R. 299, 359-360 per Estey J.

106. Id., 323-324 per Kerwin J.

107. Page 51, above.

108. Page 52, above.

109. [1953] 2 S.C.R. 299, 386.

obiter, that "it may well be that Parliament alone has power to make laws in relation to the subject of religion as such...".[110]

The wide variety of opinions written in the Saumur case, and the imprecision of some of those opinions, make it one of the most baffling cases in Canadian constitutional law. So far as the power to regulate the content of literature is concerned, the dicta in Alberta Press are approved by three judges namely, Rand, Kellock and Locke JJ., and are disapproved by one, namely Kerwin J. Cartwright J. asserts a divided jurisdiction. Estey J. offers no view on speech, except for religious speech; and Rinfret C.J. (with Taschereau J.) offers no view at all. The Saumur case, like the Alberta press case, is concerned with the provincial regulation of ideas, in this case the prior restraint of the expression of religious and political ideas which were highly controversial at the time. Even the majority judges who held that those ideas could not be censored by a province are not necessarily addressing themselves to lesser forms of content regulation or censorship. And the minority judges are clearly admitting some degree of censorship by a province in service of undoubted provincial objects such as the use of the streets or the prevention of disorder.

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110. Id., 387.

The Padlock Case

Switzman v. Elbling (1957),[111] is the third and last decision of the Supreme Court of Canada which requires extended discussion. At issue in that case was the validity of a Quebec statute entitled "An Act to Protect the Province against Communistic Propaganda", and unofficially called the Padlock Act. The Act made it illegal to use a house "to propagate communism or bolshevism by any means whatever." There were provisions authorizing the closing (or padlocking) of any house which had been used in contravention of the Act. The Act was upheld in the Quebec courts, both at trial and on appeal, but was held to be unconstitutional in the Supreme Court of Canada by a majority of eight to one.

Once again there was a preliminary issue of classification. Taschereau J., the sole dissenting judge, held that the statute was a law in relation to the use of property, and that it was valid on that basis.[112] But the other eight judges took the view that the statute was "colourable": the Quebec Legislature had cast its statute in the form of a property statute when its true purpose was to prohibit the propagation of certain political ideas. These judges all agreed that the statute was unconstitutional, but they reached the result by two different routes, more or less reproducing the dichotomy between Duff C.J. and Cannon J. in the Alberta Press case.

The group which seemed to follow Duff C.J.'s reasoning comprised Rand, Kellock and Abbott JJ. Rand J., with whom Kellock J. agreed,

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111. [1957] S.C.R. 285.

112. Id., 294-295.

classified the law as in relation to freedom of speech,[113] and held that this had "a unity of interest and significance extending equally to every part of the Dominion".[114] Abbott J. also classified the law as in relation to freedom of speech,[115] and he quoted the dicta of Duff C.J. in the Alberta Press case for the view that such a law was outside provincial competence.[116]

The remaining five judges, namely, Kerwin C.J., Locke, Cartwright, Fauteux and Nolan JJ., took the view that the Padlock Law was a "criminal law".[117] These judges found that the essential object of the Act was to prohibit the propagation of communism with penal sanctions for breach. This was tantamount to the creation of a new crime.

Switzman v. Elbling does not provide direct assistance in searching for constitutional jurisdiction over violent content. The case did strongly affirm the absence of provincial power to control the expression of political ideas, and even contained suggestions of an absence of federal power. But the judgments cannot be read as clearly denying provincial power to control the depiction of violence, because such control would have only a minor impact on the expression of political, religious or any other kinds of ideas.

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113. Id., 305.

114. Id., 306.

115. Id., 326.

116. Id., 326-328. He also asserted (at 328), obiter, that such a law would be outside the competence of the federal Parliament as well, a point which Rand J. (at 307) explicitly left open. Abbott J.'s dictum is the clearest expression in the Supreme Court of Canada of the "implied bill of rights" theory: see note 91, above.

117. Id., 288 per Kerwin C.J., 314 per Nolan J. with whom Locke J. concurred, 316 per Cartwright J., 318 per Fauteux J.

Censorship

There has been a recent decision of the Appeal Division of the Supreme Court of Nova Scotia which is now under appeal to the Supreme Court of Canada. The case is McNeil v. The Queen (1976)[118] and it concerns the validity of Nova Scotia's Theatres and Amusements Act which establishes the Nova Scotia Board of Censors, whose name was changed in 1972 to the Amusements Regulation Board, and gives the Board power to permit or to prohibit in whole or in part the public exhibition in Nova Scotia of any film. The Board viewed films in advance and determined whether or not they could be exhibited in Nova Scotia, and whether or not any deletions were required. The challenge to the Act was brought by a member of the public who had been held to have the necessary standing to sue.[119] He sought a declaration that the Board's powers of censorship were unconstitutional. The Appeal Division of the Supreme Court of Nova Scotia granted the declaration. The court held that the law was in pith and substance a criminal law. Three of the judges, namely, MacKeigan C.J., Coffin, and Cooper JJ.A., wrote short opinions in which they briefly asserted that a law directed to public morality must be a criminal law. The fourth judge, MacDonald J.A., wrote a more elaborate opinion in which he described the law as "a restraint on the fundamental freedoms that are the inherent right of every citizen of this country", and which can only be imposed by the federal Parliament in exercise of its criminal law power.[120]

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118. February 2, 1976, unreported.

119. Nova Scotia Board of Censors v. McNeil (1975), 55 D.L.R. (3d) 632.

120. Reasons for judgment, pp.17-18.

It is an unenviable task to comment upon a decision which will soon be passed upon by the Supreme Court of Canada. But the topic of censorship is important, and the discussion cannot be avoided. There are two lines of reasoning running through the McNeil case, and through the prior cases, and it is necessary to examine them separately.

The line of reasoning which appealed to three of the judges in the McNeil case is the theory that any regulation of the expression of ideas from the point of view of public morality must be a criminal law, and as such competent only to the federal Parliament. It will be recalled that this reasoning can be traced back to an isolated passage in Cannon J.'s opinion in the Alberta Press case,[121] and it will also be recalled that Duff C.J.'s opinion did not take this view.[122] In Saumur it was Duff C.J.'s reasoning which appealed to three of the judges and none of the judges accepted this broad criminal law theory.[123] In Switzman v. Elbling the majority judges divided, with three judges following the Duff reasoning, and five judges holding that the Padlock Law was a criminal law.[124] But the Padlock Law, at least as interpreted by the majority judges, was quite different from a censorship law in that the Padlock law contained all the normal ingredients of a criminal law, that is to say, it not only sought to protect public morality or order it took the form of a prohibition coupled with a penalty.[125]

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121. Page 49, above.

122. Page 48, above.

123. Page 53, above.

124. Page 55, above.

125. Even so its correctness on this point has been doubted in light of recent cases discussed in the next paragraph of the text: see Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U. of Toronto L.J. 307, 357.

The most commonly cited definition of criminal law is that given by Lord Atkin in the P.A.T.A. case:

> Criminal Law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?[126]

However, in the Margarine Reference Rand J. added the qualification, which is generally accepted, that there was a third ingredient in addition to the prohibition and the penalty; and that third ingredient was "a public purpose which can support it as being in relation to criminal law." As examples, he suggested: "public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law".[127] The Margarine Reference established that a prohibition coupled with a penalty was not a criminal law if the purpose of the law was to pursue a purpose which was not typically criminal, in that case, the protection of the dairy industry. It seems to me to be equally fallacious to classify as criminal law any law which pursues similar purposes to a criminal law, but which lacks the ingredients of a prohibition and a penalty.

The cases actually go much further than the proposition just advanced. There have been four recent cases upholding provincial statutes which were very similar in purpose to provisions of the Criminal Code. Moreover, these provincial statutes also took the form of a prohibition coupled with a penalty. In O'Grady v. Sparling (1960),[128] a provincial

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126. P.A.T.A. v. A.-G. Can., [1931] A.C. 310, 324.

127. Margarine Reference, [1949] S.C.R. 1, 50.

128. [1960] S.C.R. 804.

offence of careless driving was upheld, despite the existence in the Criminal Code of the offence of reckless driving. And in Mann v. The Queen (1966),[129] a similar provincial offence was again upheld, despite the fact that the Criminal Code by then also included the very similar offence of dangerous driving. In Stephens v. The Queen (1960),[130] a provincial offence of failing to stop at an accident was upheld, despite the existence in the Criminal Code of a similar offence. And, lest it be thought that these cases lay down some special doctrine applicable only to safety on the roads, in Smith v. The Queen (1960),[131] a provincial offence of furnishing false information in a prospectus was upheld, despite the existence in the Criminal Code of the offence of making, circulating or publishing a false prospectus. Notice how far the double-aspect doctrine has been taken by the Supreme Court of Canada in these cases.[132] Each provincial law included (1) a prohibition which was to be self-applied by the persons to whom it was addressed, that is to say, to be applied without the intervention of any administrative agency; (2) the penal sanction of a pecuniary fine, typical of a criminal law; and (3) the purpose of preventing or limiting injury or loss to person or property, again typical of a criminal law. In each case the law was upheld because it was held to be in relation to a provincial subject matter (the roads,

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129. [1966] S.C.R. 238.

130. [1960] S.C.R. 823.

131. [1960] S.C.R. 776.

132. In each of these cases there was of course also an issue of paramountcy: whether the provincial law was in conflict with a provision of the Criminal Code. This issue was also decided in each case in favour of the provincial law. The existence of the Criminal Code provisions was strictly relevant only to the issue of paramountcy, but I have recited them to show how close the provincial laws were to undoubtedly valid federal criminal laws.

securities).[133] Its penal form was held not to classify it as a "criminal" law, because of s.92(15) of the B.N.A. Act. Section 92(15) expressly authorizes the provincial Legislatures to attach penalties to otherwise valid provincial laws.

In the light of the decisions in O'Grady, Mann, Stephens, and Smith, it seems implausible to classify a provincial censorship law as criminal. The salient characteristic of censorship is an administrative process which imposes a prior restraint on material deemed offensive.[134] A criminal law, by contrast, is typically self-applied by the person to whom it is addressed: there is no intervention by an administrative agency. A criminal law is typically enforced in the ordinary courts by the imposition of a penalty after the prohibited act has been committed,

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133. In Johnson v. A.-G. Alta., [1954] S.C.R. 127, the Supreme Court of Canada divided evenly on the question of the validity of a provincial statute denying property rights in slot machines, and providing a procedure for confiscation of slot machines. Locke, Cartwright and Kellock JJ. held the law to be invalid as a criminal law, while Kerwin, Estey and Taschereau JJ. held the law to be valid as a property law. Rand J. did not decide the constitutional question, holding the law inoperative for conflict with the gambling provisions of the Criminal Code. There was no majority on the constitutional question; but the ultimate result, dictated by Rand J's casting vote, is very hard to reconcile with the later decisions in O'Grady, Mann, Stephens and Smith, which have just been discussed in the text; these later cases appear to vindicate the reasoning of the three dissenting judges in Johnson. For an excellent analysis of all these cases, see Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U. of Toronto L.J. 307, 352-360.

134. There is of course a prohibition, coupled with a penalty, on the sale or exhibition of uncensored material but this is in order to enforce recourse to the administrative process. Most provincial laws contain such enforcement provisions, enacted under s.92(15) of the B.N.A. Act.

not by a prior restraint of the prohibited act.[135] To treat a censorship law as equivalent to a provision of the Criminal Code such as s.163, prohibiting immoral, indecent or obscene performances in a theatre, is to ignore fundamental differences between the two kinds of laws: it is to assume that purpose is the sole criterion of a criminal law, an assumption which finds little or no support in the case-law, and has no other apparent merit.[136]

The argument that a censorship law may be a denial of a fundamental freedom of national dimensions seems to me to be much more plausible as a basis for invalidity. It is true that classification of laws in terms of their impact on fundamental freedoms is not well

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135. The criminal law may also include preventive measures, such as s.160 of the Criminal Code authorizing seizure of obscene literature; but s.160 would almost certainly be unconstitutional if s.159 had not made the publication and distribution of obscene literature a crime.

136. In A.-G. Ont. v. Koynok, [1941] 1 D.L.R. 548 Kelly J. of the Ontario High Court held that an Ontario law authorizing the issue of an injunction to restrain the publication of obscene literature was invalid as a criminal law. This law did not make use of an administrative tribunal, and it was held to be merely supplementary of the Criminal Code. In any event the decision was reversed on appeal on other grounds: Note [1941] 1 D.L.R. 554. In R. v. Board of Cinema Censors of Quebec; Exparte Montreal Newsdealers Supply Co. (1967), 69 D.L.R. (2d) 512 Batshaw J. of the Quebec Superior Court held that a Quebec law authorizing the censorship of magazines by the Board of Cinema Censors was invalid as a criminal law. For the reasons given in the text this case seems to me to be wrongly decided.

entrenched in the cases, and has been criticized;[137] but its articulate expression by such highly respected judges as Duff C.J. and Rand J.,[138] its approval in the extra-judicial writings of Laskin C.J.,[139] and its inherent appeal,[140] lead me to conclude that it probably will be accepted by the Supreme Court of Canada. But in this realm, as Duff C.J. made so clear in the Alberta Press case,[141] we are involved in questions of

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137. Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U. of Toronto L.J. 307, 342-352. There is some force in Weiler's criticism (at 399) that the Court has used federalism as a kind of surreptitious bill of rights, allocating jurisdiction to that level of government which has not exercised it in order to invalidate a law which it really believes should not be enacted at all. But I think he presses the argument too far in asserting (at 347) that there is a "logical difficulty" in classifying a law for federalism purposes in terms of the law's impact on civil liberties. Now, to be sure, there is always room for dispute as to the appropriate classification of any disputed law; but surely there is no logical difficulty in classifying the laws in Alberta Press, Saumur and Switzman as being in relation to freedom of speech, on the ground that their primary purpose and effect was to suppress the expression of political or religious ideas. Weiler says (at 347) that classification of laws should be in terms of the "objectives or reasons" of the Legislature (excluding, I suppose, the effects of the laws), but why does this formula exclude the possibility that the suppression of ideas may be the objective of or reason for the law?

138. The dicta in Alberta Press, Saumur and Switzman have been described above pp.45-56. To these references could be added the opinions of Rand and Estey JJ. in Winner v. S.M.T. Eastern, [1951] S.C.R. 887; revd. in part, but without reference to this issue, sub nom. A.-G. Ont. v. Winner, [1954] A.C. 541.

139. Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37 Can. Bar Rev. 77, 99-125; Canadian Constitutional Law (4th ed. rev., 1975), 900.24.

140. I am persuaded by the argument that the expression of ideas has a national dimension which takes it out of property and civil rights "in the province" or matters of a merely local or private nature "in the province". I do not recoil from the conclusion that the federal Parliament has the constitutional power to suppress or limit freedom of speech, because in my view the alternative, which is the implied bill of rights theory, is not a plausible interpretation of the B.N.A. Act.

141. Page 48, above.

degree. Not every impairment of free speech is so important as to outweigh legitimate provincial interests and attain a national dimension. The laws of libel and slander and anti-noise by-laws are examples of valid provincial limitations of free speech.[142] In the Alberta Press case what was involved was criticism of the policies of a provincial government; and yet, presumably because the law insisted upon a right of reply rather than simply banning criticism, Duff C.J. was not sure whether it passed beyond the legitimate provincial realm of regulating newspapers and into the forbidden free speech category. In Switzman v. Elbling[143] what was essentially involved was a prohibition on the propagation of certain political ideas which were distasteful to the provincial government. Here the violation of civil libertarian values was very clear. In Saumur[144] the by-law could have been administered in a number of ways, some of them clearly within provincial power (e.g. to regulate traffic, or reduce litter); but in fact it was used to censor material to be distributed on the streets. Rand J., who held the by-law to be unconstitutional, specifically addressed himself to the breadth of the discretion given to the Chief of Police:

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142. E.g., R. v. Harrold (1971), 19 D.L.R. (3d) 471 (B.C.C.A.); R. v. Young (1973), 1 O.R. (2d) 564 (Ont. C.A.). Cf. Courchone v. Marlborough Hotel Co. (1971), 20 D.L.R. (3d) 109 (Man. Q.B.).

143. Page 50, above.

144. Page 55, above.

> Conceding, as in the Alberta Reference, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter in relation to which the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary license cannot be brought within either of these mechanisms; and the Court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.[145]

It is true of course that Rand J's views were not accepted by the majority of the court in that case, but for the reasons given earlier[146] I expect them to become accepted. The passage quoted is well known, widely admired, and it seems to me, with respect, to be correct. I see in that passage the key to the issue of fundamental political civil liberties in general and censorship in particular. Where discretionary power is conferred to censor or control speech or writing,

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145. [1953] 2 S.C.R. 299, 333.

146. Page 63, above.

and where the power is so broad that it could be used to censor political, religious or philosophical ideas, then the power will be classified as an impairment of a "national" civil liberty and will be held to be incompetent to the provincial Legislature. But where discretionary power is conferred in terms which are carefully limited to legitimate local objects then it will be valid.

If this analysis is correct, then it seems to me that McNeil v. The Queen[147] was rightly decided by the Nova Scotia Appeal Division, and will be affirmed by the Supreme Court of Canada. In my opinion the crucial element was the absence of any statutory criteria which the censorship board was to apply. This absence in the statute was commented upon by the court. There was not even evidence of any policy guidelines adopted by the board; and the banning of the movie "Last Tango in Paris", which is what prompted McNeil's action, was announced by the board without any supporting reasons. Macdonald J.A. pointed out that film censorship was normally associated with "sex, morals and violence", and that many other jurisdictions wrote these or similar criteria into their censorship laws. But in the Nova Scotia case, he said, "the censorship criterion, being left to the Board to determine, could be much wider and encompass political, religious and other matters".[148]

In my view these distinctions are sound and are fatal to the validity of the Nova Scotia Act. What remains for consideration is the question whether a censorship law carefully limited to explicit violence

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147. Page 57, above.

148. Reasons for judgment, p.15.

(or other detailed criteria) would be valid. The answer to this question cannot be given with confidence. The view that any law dealing with public morality is a criminal law would of course be fatal to even a limited provincial censorship law. But I have already given my reasons for rejecting that view as unsound.[149] My opinion is that such a limited censorship law would be competent to the province. It would not be a criminal law for the reasons given earlier.[150] It would not be a denial of fundamental national civil liberties, because it would not, and could not, be used as a mode of censoring ideas except in the relatively minor and incidental respect that explicit violence may convey a particular idea deemed important by the film maker.

It must be remembered that the regulation of media other than radio and television is primarily provincial. It must also be remembered that community attitudes to the depiction of violence or sex undoubtedly vary from one locality to another. It seems to me that the regulation of local media could extend to censorship carefully limited to matters of primarily local concern such as the depiction of violence.

It is perhaps prudent to add one final paragraph by way of clarification of the foregoing. The suggestion that some degree of provincial censorship is constitutional does not imply approval of censorship. The issue for this paper is not whether censorship is wise or unwise, good or bad; but simply which level of government has the constitutional power to enact it. The decision in the McNeil case was

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149. Pages 58-62 , above.

150. Ibid.

regarded as a victory for those who oppose censorship, and so it was in the sense that a particular censorship law was struck down. But all of the judges made clear that a similar law could have been enacted by the federal Parliament.[151] The constitutional issue simply concerned the distribution of powers in the federal system. Moreover, as will be explained later,[152] powers which are allocated by the courts' interpretations of the B.N.A. Act to one level of government can easily be delegated to the other level of government.

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151. None of the judges indicated any support for the implied bill of rights theory, under which neither Parliament nor the Legislatures could impair freedom of speech: see notes 91, 116, 140 above. Of course, if Parliament did enact a censorship law the question would arise whether or not it was in conflict with the Canadian Bill of Rights, which is applicable only to federal laws.

152. Page 93, below.

The Canadian Bill of Rights

Federal legislation with respect to the media is, of course, subject to the Canadian Bill of Rights, which guarantees freedom of speech (s.1 (d)) and freedom of the press (s.1 (f)). The courts would hold inoperative any federal law violating either of those freedoms. The Supreme Court of Canada has never had occasion to consider those particular freedoms,[152a] but the courts have generally been very reluctant to hold that a federal law is in conflict with the Bill of Rights.[152b] Moreover, the Bill of Rights itself, by s.2, enables the federal Parliament to exempt any statute from the requirements of the Bill of Rights by including in the statute a declaration that the statute "shall operate notwithstanding the Canadian Bill of Rights."[152c]

The Canadian Bill of Rights does not apply to provincial legislation, although Alberta and Quebec both now have their own Bills of Rights. Ontario and the other provinces do not have such Bills of Rights.

152a But see R.-v.C.K.O.Y. Ltd. (1976) to D.L.R. (3d) 662 (Ont.C.

152b Only one statute has been held to be in conflict: R. v. Drybones [1970] S.C.R. 282.

152c This clause has been included once: Public Order (Temporary Measures) Act, 1970, S.C. 1970-71-72, c.2, s.12.

Policy Options

The rest of this study will examine each of the policy options mentioned in the Interim Report dated January 1976 of the Royal Commission on Violence in the Communications Industry, and will advise where the constitutional responsibility for each possibility lies.

Enforcement of Criminal Law

It is suggested in the Interim Report, p.III-31, that governments could attempt more vigorous enforcement of existing laws, such as the "Criminal Code, and customs and post office provisions dealing with obscene violence in printed material and films." By long tradition, of course, decisions as to whether to lay a particular charge or whether to prosecute a particular individual, and indeed all decisions about individual cases, are made by police officers or Crown Attorneys independently of government direction.[153] But certainly in Ontario and the other provinces it is the Attorney General who is the chief law enforcement officer of the Crown, and I assume that through him the government may effectively insist upon general policies with respect to police and prosecutorial enforcement of the criminal law. The question which I have to consider is: which level of government has the constitutional responsibility for the enforcement of the criminal law?

Section 92(14) of the B.N.A. Act gives to the provincial Legislatures the power to make laws in relation to:

> The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

This head of legislative power must be read with s.91(27), which gives to the federal Parliament the power to make laws in relation to:

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153. On the role of the police, see McCleave v. City of Moncton (1902), 32 S.C.R. 106; on the role of the prosecutor, see Annotation to R. v. Pelletier (1975), 28 C.R. N.S. 160. These are two leading references from a vast literature.

> The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.

So far as the criminal law is concerned, it is the federal Parliament which has the power to enact the substantive law and the procedural law; but it is the provincial Legislature which has the power to enact laws in relation to the administration of justice, including the establishment of courts of criminal jurisdiction. Under the administration of justice power, the province of Ontario (in common with the other provinces) has established a hierarchy of courts and invested them with the jurisdiction to try criminal cases. Of course, the law to be applied and the procedure to be followed in those courts is enacted by the federal Parliament.

The province has also exercised its power over the administration of justice by providing for the provincial enforcement of the criminal law through provincial police forces and provincial Crown Attorneys, who are within the responsibility of the provincial Attorney General. There has developed a longstanding practice under which the province (through its police and Crown Attorneys) enforces the federal Criminal Code. Of course, provincial law enforcement officers also enforce offences under provincial statutes. Although the province cannot enact "criminal law", under s.92(15) of the B.N.A. Act the province can add penal provisions to otherwise valid provincial statutes. As a result, there are many provincial offences.

The constitutionality of provincial enforcement of the federal Criminal Code has never been challenged, and is not in doubt. It derives

from the province's legislative and executive[154] power over the "administration of justice", a term which includes criminal justice.[155]

The federal Parliament also has the power to provide for the enforcement of its own laws, including the criminal law. In fact, as already noticed, offences under the Criminal Code are prosecuted by provincial authorities. But offences under statutes other than the Criminal Code, for example, the Combines Investigation Act, the Narcotic Control Act, the Customs and Excise Act, the Income Tax Act and the Post Office Act are prosecuted by counsel for the federal Department of Justice, instead of by provincially-appointed prosecutors. This federal power of enforcement flows from the principle that a grant of legislative authority over the criminal law (or any other subject matter) carries with it the executive power to enforce the statutes enacted under that authority. The federal power to provide for the appointment of federal prosecutors for federal offences has been upheld on this basis in two recent Ontario

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154. Section 92 allocates only legislative power, but it is well established that the B.N.A. Act implicitly grants executive power corresponding to the heads of legislative power.

155. This has been distinctly decided in Di Iorio v. Warden of the Common Jail of Montreal, S.C. Can., April, 1976, not yet reported, laying to rest the theory that provincial enforcement of federal criminal law had to derive from a delegation by the federal Parliament to provincial law enforcement officials. The delegation theory was espoused by Laskin C.J. and de Grandpre J. in dissent: Reasons for Judgment of Laskin C.J. at p.27; but the other seven judges held that the enforcement of criminal law derived from s.92(14). On this basis, the majority upheld the constitutionality of a Quebec inquiry into organized crime. For further authority, see R. v. Pelletier (1974), 4 O.R. (2d) 677, 683-684 (Ont. C.A. per Estey J.); G.V. La Forest, "Delegation of Legislative Power in Canada" (1975) 21 McGill L.J. 131, 133.

decisions.[156] It would seem to follow that the federal Parliament could confer the enforcement of all federal criminal laws, including the Criminal Code, on federally-appointed officers. However, the federal Parliament has not done so, and I suppose there would be a constitutional question as to whether the federal Parliament could altogether exclude provincial authority to enforce federal criminal laws.[157]

The legal position may be summarized as follows. The power to prosecute offences under provincial statutes is exclusively provincial, stemming both from the power in s.92(14) over the administration

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156. The first decision is Re Collins and the Queen, [1973] 2 O.R. 301. This decision of Donnelly J. in the H.C. Ont. was appealed to the Ont. C.A., but the C.A. held that the appeal abated when Collins died before a decision had been rendered and accordingly did not deal with the appeal on the merits: Re Collins and the Queen, [1973] 3 O.R. 672. The second decision is R. v. Pelletier (1974), 4 O.R. (2d) 677; annotated in (1975) 28 C.R.N.S. 160. This is a decision of the Ont. C.A., and leave to appeal to the Supreme Court of Canada was refused on October 11, 1974. In this case Estey J. for the court suggested a possible alternative basis for the federal power to enforce criminal law. He said that if it were the case that the provincial power over the administration of justice under s.92(14) had by implication removed the prosecutorial function from s.91(27), "it may then be found that a matter of national concern arises", and that under the peace, order, and good government power "a revival of the related executive function would take place": 4 O.R. (2d) 679, 703. However, his lordship did not appear to support the suggested narrower interpretation of s.91(27), because much of his opinion is given over to the citation of authority for the proposition that the power to make criminal law carries with it the power to enforce any laws so made.

157. In R. v. Pelletier (1974), 4 O.R. (2d) 677, 702 Estey J. left this point open: "the most difficult potential issue is deferred to another day and another Court".

of justice and from the principle that legislative authority includes the executive power of enforcement. The power to prosecute offences under federal statutes is concurrent:[158] the provincial government's power stems from the power in s.92(14) over the administration of justice; the federal government's power stems from the power in s.91(27) over the criminal law which includes the executive power of enforcement. The exact boundaries of function at any given time depend upon the statutes respecting enforcement which are in force, and upon informal agreements (or acquiescences) by the two levels of government. At present the arrangement may be described in these general terms: the enforcement of the Criminal Code (as well, of course, as penal provisions in provincial statutes) is undertaken by the provincial authorities, while the enforcement of penal provisions in federal statutes other than the Criminal Code is undertaken by the federal authorities.

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158. R. v. Pelletier (1974), 4 O.R. (2d) 677, 703 per Estey J.; Di Iorio v. Warden of the Common Jail of Montreal, S.C. Can., April 1, 1976, not yet reported, at p.13 per Dickson J., at p.5 per Beetz J.

Civil Actions

The creation of new civil causes of action, conferring upon individuals a right to obtain damages for loss or injury, is a matter within provincial jurisdiction under "property and civil rights in the province", head 13 of s.92 of the B.N.A. Act. This is the constitutional basis of the law of torts, of which the defamation laws are part. It would therefore be possible, as the Interim Report, p.III-31, suggests, for a province to create new civil causes of action for loss or injury caused by media content; and it would be possible to authorize "class actions" by large numbers of similarly-situated viewers. Of course, if the primary purpose was to penalize the media, as opposed to giving a remedy to the viewers, then there would be a risk that the court would hold that the law was invalid as a "colourable" attempt to enact criminal law[159] under the guise of conferring a civil right of action.[160]

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159. The criminal law is of course a federal responsibility under s.91(27) of the B.N.A. Act.

160. This issue has been controversial in many cases and has produced many decisions which are divided and many which are difficult to reconcile with each other: see, for example, Bedard v. Dawson [1923] S.C.R. 681; Provincial Secretary of P.E.I. v. Egan [1941] S.C.R. 396; Johnson v. A.-G. Alta. [1954] S.C.R. 127; Switzman v. Elbling [1957] S.C.R. 285.

Research and Information

The conduct of research and the provision of information ~~and~~ are functions of government which do not involve altering the law, or changing the rights and liabilities of individuals. As such they can be performed or commissioned by either level of government and no constitutional issue is raised. For example, either level of government could publish information about the violence content of particular movies or television shows, or could undertake a more general program of education about or research into the effects of violence in the media.

Any program of research or information would, of course, cost money; but the next section of this study, on Governmental Subsidy or Participation in Industry, will show that it is reasonably clear that a government may spend money for any purpose it sees fit, provided of course that the money has been appropriated for that purpose by the federal Parliament, in the case of expenditures by the federal government, or the Ontario Legislature, in the case of expenditures by the provincial government.

[There is no note 161.]

Governmental Subsidy or Participation in Industry

The elimination or reduction of violence in the mass media may well involve expenditure by governments. Any form of governmental intervention would obviously cost money; but, in addition, governments may wish to subsidize groups seeking a reduction in violence in the media, or may wish to subsidize the industry itself in order to compensate it for lost revenue from violence or to help provide alternative programing, or may wish to participate in the industry in order to directly influence its product. Of course, there is already a substantial financial involvement in the mass media by both levels of government: for example, federal subsidization of the C.B.C., provincial subsidization of TV Ontario, and federal and provincial assistance to private film makers, theatre groups and publishers.

The only constitutional question which is raised is whether each level of government may spend or lend its money for purposes which are outside its legislative authority. The probable answer to this question is that spending money is not the same as enacting laws which will alter people's rights and liabilities; and, although spending will require an appropriation by the Parliament or the Legislature, it is not limited to purposes within legislative power. It follows that the government of Canada or of a province may give financial aid to any person or group, and for any purposes, without regard for the constitutional jurisdiction over that person, group or purpose.

I have described this conclusion as "probable" because there is nothing in the B.N.A. Act, and no case, which clearly decides the point. There has, however, been a good deal of discussion of the federal spending power, because of the huge federal expenditures in the form of equalization payments and other unconditional grants to the

provinces, and in the form of contributions to shared cost programs such as medicare, hospital insurance and welfare. A substantial portion of the revenue raised by federal taxes is thus spent for purposes lying outside federal legislative authority. Moreover, the contributions to the shared-cost programs are normally conditional upon the establishment or maintenance of the program in accordance with stipulations which have been made by the federal government, but which in many cases the federal Parliament could not have directly legislated. Indeed much of the structure of federal-provincial financial relations is premised on the view that there is no constitutional limit to the federal spending power: the federal Parliament may appropriate funds for any purpose whatever, including purposes upon which it could not legislate; and may attach to any grant or loan any conditions whatever, including conditions it could not directly legislate.

This broad view of the federal spending power has been accepted by the federal government,[162] of course, and probably by all provincial governments despite occasional objections to federal intrusions on provincial autonomy. Most constitutional commentators also accept the broad view of the federal spending power.[163] Even so, it cannot be said

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162. P.E. Trudeau, Federal-Provincial Grants and the Spending Power of Parliament (Government of Canada Working Paper on the Constitution, 1969), 8-14.

163. La Forest, The Allocation of Taxing Power under the Canadian Constitution (1967), 36-41; Laskin, Canadian Constitutional Law (4th ed. rev., 1975), 637-638; Smiley, Conditional Grants and Canadian Federalism (1963), ch. 11; W.R. Lederman, "Some Forms and Limitations of Cooperative Federalism" (1967) 45 Can. Bar Rev. 409, 428-433.

that the scope of the federal spending power has been definitively settled. One decision of the Exchequer Court[164] affirms the validity of federal family allowances, but the decision of the Privy Council in the Unemployment Insurance Reference[165] contains dicta which are equivocal. There is, therefore, still room for argument that the federal spending power is confined to objects within federal legislative competence, but the dominant opinion that the power is not so confined is in my view the better one.

The understandable preoccupation of governments and commentators with the power to disburse from the ample federal purse has not been matched by an equivalent concern about the provincial situation.[166] It seems to me, however, that the essence of the argument for an unlimited federal spending power is equally applicable to provinces. The essence of the argument, as it appears to me, lies in the distinction between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting which imposes either no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a loan or conditional grant).[167] It seems to me that there is no reason to

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164. Angers v. M.N.R., [1957] Ex. C.R. 83.

165. A.-G. Can. v. A.-G. Ont., [1937] A.C. 355, 366-367 per Lord Atkin.

166. The only discussion I have been able to find is La Forest, The Allocation of Taxing Power under the Canadian Constitution (1967), 60-62, an admirable account to which I am indebted.

167. The recipient who needs the loan or conditional grant may not accept the obligations "voluntarily" in the broadest sense of that term, but there is a clear legal distinction in my view between the contractual or quasi-contractual assumption of an obligation and the compulsory imposition of an obligation.

confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects.

Against this approach it may be argued that the financial resources for the spending, lending or contracting will have been mainly derived from the compulsory levy of taxation, and since the provincial power of taxation is expressly limited to "the raising of a revenue for provincial purposes" the spending power should be limited to provincial legislative purposes. However, there are several reasons which lead me to reject this conclusion. First of all, there is a dictum by Duff C.J. asserting that "the words 'for provincial purposes' mean neither more nor less than this: the taxing power is given to them for raising money for the exclusive disposition of the legislature".[168] Secondly, there are cases which decide that a province may validly sell its property subject to conditions which would be outside its legislative competence.[169] Thirdly, in the absence of rather clear indications in the B.N.A. Act to the contrary, it seems likely that the provincial spending power would be as ample as the federal spending power.[170] Fourthly, the provinces have never recognized any limit on their spending powers and have often spent money for purposes outside their legislative

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168. Reference re Employment and Social Insurance Act, [1936] S.C.R. 427, 434 per Duff C.J. dissenting. Of course this makes the words "for provincial purposes" virtually meaningless, but the phrase "with provincial objects" in s.92(11), "the incorporation of companies with provincial objects", has met a similar fate.

169. Smylie v. R. (1900), 27 O.A.R. 172; Brooks-Bidlake and Whittall Ltd. v. A.-G. B.C., [1923] A.C. 450; cited by La Forest, The Allocation of Taxing Power under the Canadian Constitution (1967), 61.

170. Page 79, above.

competence, for example, by running a commuter train service on interprovincial trackage[171] or by subsidizing an airline.[172]

My conclusion, despite the complexity of the reasoning, accords with the common understanding that either level of government may spend, lend or contract for purposes outside its legislative competence. The province of Ontario, for example, could operate or subsidize a radio station notwithstanding its lack of legislative competence over the station. And the federal government, for example, could operate or subsidize a theatre, notwithstanding its lack of legislative authority over the theatre.

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171. The Queen (Ont.) v. Board of Transport Commrs., [1968] S.C.R. 118.

172. La Forest, The Allocation of Taxing Power under the Canadian Constitution (1967), 62. He gives other examples as well.

Content Regulation

The topic of content regulation has been extensively discussed in this study.[173] The position may be briefly summarized as follows.

There is no doubt that a straightforward criminal law which prohibits the depiction of violence in any one or more forms of the media (including local media), and which imposes a penalty for contravention, is a criminal law which comes solely within the jurisdiction of the federal Parliament. There is also little doubt that a province has no jurisdiction to prevent in a substantial way the expression of political, religious or philosophical ideas: the expression of such ideas is a fundamental freedom which has national, and not merely local significance.

The difficulty arises with respect to more limited and more complex forms of content regulation. There is an argument that all content regulation should be classified as criminal law, no matter how far it departs from the traditional "criminal" format. There is also an argument that all content regulation should be classified as a denial of a fundamental freedom, no matter how local or limited its purposes are. I have already explained that in my view these arguments go too far in their denial of any provincial role in content regulation. The more likely state of our constitutional law is that forms of content regulation which are not typically criminal in form, for example, because they make use of an administrative agency, and which are carefully limited to controlling the depiction of violence, follow the constitutional boundaries of the media. This means that the federal Parliament

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173. Pages 44-68, above.

may (subject to the Canadian Bill of Rights)[180] impose content regulation on radio and most forms of television; and the provincial Legislatures may impose content regulation on films, live theatre, literature, and records. Where a movie or play is shown on television, it would, of course, lose the local feature that keeps it within provincial jurisdiction, and it would come within federal jurisdiction.

This opinion must be treated as tentative only, since there is no decision of the Supreme Court of Canada on that point. Several cases now under appeal to the Supreme Court may result in a clarification of the position within a year or two.[181]

It is perhaps unnecessary to repeat that content classification by government, which is solely a matter of information, unaccompanied by rules restricting such matters as times of exhibition or age of audience, is within the competence of either level of government (and indeed of any individual citizen who can find someone to listen to his views).[182]

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180. See p.68, above

181. 174. Re Capital Cities Communications, 1975 F.C. 18; Kellogg's Co. of Canada v. A. -G. Que., Que. C.A., June 20, 1975, not yet reported; McNeil v. The Queen, N.S. App. Div., February 2, 1976, not yet reported.

182. 175. Page 76, above.

Licensing

The term "licensing" has no precise legal meaning: it implies only that each of the participants in an industry must hold a licence; but a licensing regime could be established whose sole purpose was to keep records of the participants in an industry, or whose sole purpose was to raise revenue by imposing a fee on participants in an industry. In the context of controlling the depiction of violence, a licensing scheme would no doubt involve an obligation on the part of licence-holders to comply with rules concerning the depiction of violence, and a power in the licensing authority to cancel the licence of any holder who did not abide by the rules. Such a licensing scheme would be treated by the courts as being a pith and substance the regulation of content. The previous section of this study on the constitutional jurisdiction to regulate content[176] is accordingly applicable here too.

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176. Page 82, above.

Media Council or Ombudsman

The Interim Report, p. III-32, suggests the possibility that "governments could establish one or more media ombudsmen to entertain, investigate and report on complaints about media violence". Consistently with the principles that governments are free to provide information on any matter they choose,[177] and to spend money for any object they choose,[178] it is obvious that any government could establish a media council or media ombudsman whose functions did not involve any coercive powers. Probably, however, in order to be effective, a media ombudsman would require some coercive powers of investigation, and in particular the powers to compel the oral testimony of witnesses and the production of documents. The granting of such coercive powers would require legislation which would have to come within the legislative powers of the enacting Parliament or Legislature.[179] Since legislative jurisdiction over the media is divided partly along industry lines, and partly along other lines, the establishment and empowering of an ombudsman would present some constitutional difficulty. The federal Parliament could establish an ombudsman for radio and most forms of television, since its constitutional authority over those media is probably plenary.[180]

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177. Page 76, above.

178. Page 81, above.

179. In Re Public Utilities Commn. and Victoria Cablevision Ltd. (1965), 51 D.L.R. (2d) 716 the litigation was over a provincial demand for information from the cable companies; the B.C.C.A. held that provincial demand was unconstitutional, assuming, I think rightly, that the power to compel information followed the power to regulate. In Di Iorio v. Warden of the Common Jail of Montreal, S.C. Can., April 1, 1976, not yet reported, the S.C. Can. upheld the validity of an inquiry into organized crime to be conducted with provincially-granted coercive powers by the Quebec Police Commission; the S.C. Can. assumed that the province had to have a specific legislative power to empower such an inquiry, and the majority found it in s. 92(14) of the B.N.A. Act.

180. Pages 14-43, above.

The provincial legislature could establish an ombudsman for films, theatres, literature and records;[181] but since his office would be to enquire into the content of the material exhibited, performed, written or spoken, and possibly even to insist upon changes in content, this would raise the question of the extent of provincial power to regulate content. I have already given my opinion that, while the law is far from clear at the moment, it is probable that a carefully limited regulatory power over violent content in those industries is competent to the province,[182] and therefore an investigatory power would be too.

181. Pages 9-13, above. A distinction would probably have to be made between production and distribution of those forms of the media which are produced for more than one jurisdiction: page 12, above.

182. Page 82, above.

Self-Regulation by Industry

There is of course no constitutional issue raised where a group of professionals or business firms elect to regulate themselves. The media, or any section of the media, could do this. Such regulation depends upon the consent of the various participants, and it can be legally enforceable by virtue of the law of contract. The difficulty is that a regime of self-regulation will not be effective in respect of a member of the industry who does not agree to join the regime; and a voluntary regime, by hypothesis, cannot insist that every member of the industry must join the regime. It is possible that some industries which are heavily concentrated, and in which it is difficult for new members to establish themselves, could regulate themselves very effectively. But in most industries a statutory framework is required which will ensure that all members of the industry are subject to the regulatory regime, whether they agree or not. Once such a statute has been enacted, the regulatory authority, while it may consist wholly of people appointed by the industry, is, in law, exercising statutory powers. It is no different from a regulatory authority appointed by government. Any statute which confers regulatory powers must be enacted by the legislative body with the constitutional jurisdiction to impose that kind of regulation.

It follows from the foregoing that the enactment of a statute giving authority to a media-controlled committee or board to regulate violence in the media would give rise to exactly the same constitutional issues as discussed under content regulation, above.[183]

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183. Page 82, above.

Import Controls or Tariffs

The Interim Report, p.III-31, suggested the possibility of import controls or customs duties as devices for excluding from Canada, or making more expensive, imported material with violent content. Indeed there are already some controls of this kind.[184] Import controls and customs duties can be enacted only by the federal Parliament.

The regulation or prohibition of the importation of goods into Canada is within federal legislative authority. Perhaps the clearest authority for this proposition is the Margarine Reference (1948),[185] where the Supreme Court of Canada held that the federal Parliament could prohibit the importation of margarine in order to protect the dairy industry,[186] despite the fact that the Parliament could not prohibit the manufacture and sale of margarine within Canada for the same purpose. The federal authority over importation is derived from "trade and commerce" in s.91(2) of the B.N.A. Act.[187] It is also clear that the provinces do

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184. Customs Tariff Act, R.S.C. 1970, c. C-41, s.14 and Schedule C.

185. Reference re Validity of s.5(a) of the Dairy Industry Act, [1949] S.C.R. 1; affd. sub nom. Canadian Federation of Agriculture v. A.-G. Que., [1951] A.C. 179.

186. Six of the seven judges distinctly decided this. Only Locke J. did not express an opinion on the point. The appeal to the Privy Council did not include the question of importation.

187. In Gold Seal Ltd. v. Dominion Express Co. (1921), 62 S.C.R. 424 the S.C. Can., while upholding federal power to prohibit the importation of liquor, was not clear as to whether the power derived from s.91(2) or from the opening words of s.91 ("peace, order, and good government"). But the Margarine Reference, note above, and Caloil Inc. v. A.-G. Can., [1971] S.C.R. 543 make clear that the power is derived from s.91(2).

not have the power to regulate or prohibit the importation of goods into Canada.[188]

The levying of customs duties on goods imported into Canada is within federal legislative authority. This authority is derived from the federal taxing power in s.91(3) of the B.N.A. Act,[189] as well as from the federal "trade and commerce" power in s.91(2) of the B.N.A. Act.[190] The provinces have no power to levy customs duties, because the provincial taxing power is limited by s.92(2) of the B.N.A. Act to the levy of "direct" taxes, and customs duties are "indirect" taxes.[191]

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188. In the Local Prohibition case, A.-G. Ont. v. A.-G. Can., [1896] A.C. 348, the reference to the court included the question whether a province could prohibit the importation of liquor into the province. The Privy Council's opinion gave a negative answer, but the formal order of the court gave an equivocal answer: Laskin, Canadian Constitutional Law (4th ed. rev., 1975), 139. The judgments in Gold Seal and the Margarine Reference make clear either by express words or by implication that the negative answer was the correct one.

189. Section 122 of the B.N.A. Act, which expressly refers to customs and excise, is a transitional provision only, and no longer of any practical importance except in so far as it confirms that s.91(3) must be read as including customs duties: La Forest, The Allocation of Taxing Power under the Canadian Constitution (1967), 7, 31.

190. The dual basis of customs duties is expressed in the Johnny Walker case, A.-G. B.C. v. A.-G. Can., [1924] A.C. 222; and it makes good sense in light of the close connection between the regulation or prohibition of importation and customs duties.

191. A.-G. B.C. v. McDonald Murphy Lumber Co., [1930] A.C. 357 and see note 189, above. For general discussion of the distinction required by the B.N.A. Act between direct and indirect taxes, see La Forest, The Allocation of Taxing Power under the Canadian Constitution (1967), Ch. 4.

Taxation

Taxation is a device which is available to both levels of government. As indicated in the earlier discussion of Import Controls or Tariffs,[192] the federal Parliament has the power to levy any kind of tax it chooses under s.91(3) of the B.N.A. Act ("the raising of money by any mode or system of taxation"), while the provincial Legislatures are confined to "direct" taxation by s.92(2). The limitation on the provincial power precludes, as we have seen, a provincial customs or excise tax, because such a tax is indirect;[193] but most other kinds of taxes are direct, or can be drafted in such a way that they are deemed to be "direct".[194]

The only constitutional difficulty about using a tax to discourage violence in the media is the danger that a court will hold that the tax is "colourable", and that the primary purpose of the statute is to secure a regulatory objective. There have been a few cases in which taxes have been struck down on the basis that they were in pith and substance attempts to regulate matters outside the legislative authority of the Parliament or Legislature which imposed the tax. For example, a federal tax on insurance policies has been held to be an invalid attempt to regulate the business of insurance, a provincial subject matter;[195] a provincial tax on banks has been held to be an invalid attempt to regulate banking, a federal subject matter;[196] and a provincial tax on

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192. Page 88, above.

193. Page 89, above.

194. See La Forest, The Allocation of Taxing Power under the Canadian Constitution (1967), Ch. 4.

195. Re Insurance Act of Canada, [1932] A.C. 41.

196. A.-G. Alta. v. A.-G. Can., [1939] A.C. 117.

minerals has been held to be an invalid attempt to regulate interprovincial trade, a federal subject matter.[197] The facts need to present an extreme case in order to attract a finding of colourability. Most taxes are designed to accomplish social or economic objectives as well as to raise revenue, and the courts will not usually ask the question whether the ulterior objectives are also within the constitutional power of the taxing Parliament or Legislature.

In the case of a tax on the media which was in some way related to violent content, if the court did characterize the tax as being in pith and substance an attempt to regulate violent content in the media, then the validity of the statute would depend upon the considerations described above as to constitutional jurisdiction to regulate the content of the media.[198]

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197. Texada Mines Ltd. v. A.-G. B.C., [1960] S.C.R. 713.

198. Page 82, above.

Federal-Provincial Co-operation

It will by now be abundantly clear that the lines of constitutional jurisdiction over the media are complex, and in some respects blurred. Any concerted action on the depiction of violence in all the media would obviously involve both levels of government. Even in fields where jurisdiction is fairly clear, for example, the federal jurisdiction over radio, the body with jurisdiction may well seek or welcome consultation with other authorities. The interdependence of federal and provincial governments, and the pervasiveness of federal-provincial cooperation, are obvious characteristics of the Canadian federation, and I do not intend to pursue them.

What I do intend to describe is the legal technique for shifting (or, more accurately, delegating) jurisdiction from one level of government to another. The case of interprovincial and international road transport is an interesting example. In A.-G. Ont. v. Winner,[199] the Privy Council, in its last Canadian constitutional appeal, held that the province of New Brunswick had no power to regulate a bus service which ran from Maine to Nova Scotia, but which passed through New Brunswick and picked up and put down passengers in New Brunswick. This decision was highly inconvenient in that the provinces had been regulating interprovincial and international carriers, along with local carriers, for many years. The provinces had the personnel and the physical facilities to accomplish the task. The federal government did not. It was therefore agreed between the federal and provincial governments that the federal Parliament

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199. [1954] A.C. 541.

would delegate back to the provincial highway transport boards the power to regulate the interprovincial and international carriers. This arrangement was carried out by a short statute which required interprovincial and international carriers to obtain a licence from the transport board of any province in which they operated, and which authorized the provincial transport boards to issue licences to interprovincial and international carriers on the same terms as local carriers. The practical effect of this statute was to reverse completely the unwelcome decision in Winner. The statute has been upheld in the Supreme Court of Canada.[200]

It is clear from the highway transport precedent that if the Supreme Court of Canada were to decide that the provinces had no power of movie censorship,[201] for example, the federal Parliament could return the power to the various provincial censorship boards. Similarly, elements of provincial jurisdiction could be delegated by the provinces to federal agencies. In other words, where governments agree, the lines of constitutional jurisdiction can for practical purposes be shifted by the device of federal inter-delegation.[202]

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200. Coughlin v. Ontario Highway Transport Board, [1968] S.C.R. 569; R. v. Smith, [1972] S.C.R. 359.

201. This issue is before the S.C. Can. at the time of writing, on appeal from the N.S. Appeal Division in McNeil v. The Queen, February 2, 1976, not yet reported.

202. The one kind of federal inter-delegation which is inadmissible is a delegation to the primary legislating body (the federal Parliament or provincial Legislature) of the other level of government: A.-G. N.S. v. A.-G. Can., [1951] S.C.R. 31; but a delegation to a subordinate body of the other level of government is valid: P.E.I. Potato Marketing Board v. Willis, [1952] 2 S.C.R. 392; see generally W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967) 45 Can. Bar Rev. 409.

This process is, in fact, already under way in the broadcasting field. The Government of Canada and the Government of Manitoba recently concluded an agreement providing for provincial regulation of some non-content aspects of cable television.[203] And the federal Minister of Communications at the time of writing had proposed amendments to the Broadcasting Act to provide a broader statutory basis for such agreements and for provincial participation in the regulation of broadcasting.[204]

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203 Cable Carrier Hardware Arrangement. See House of Commons, Debates, November 10, November 16 and December 7, 1976.

204 Bill C-43, An Act Respecting Telecommunications in Canada, First Reading March 22, 1977.